Chapter 12
Closing Argument

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I. INTRODUCTION

This chapter discusses the propriety of specific closing arguments and suggests techniques to use in the presentation of your closing arguments. The format of the legal section is structured so that a prosecutor can read the attorneys' actual argument (if quoted in the opinion) and the court's ruling.

Please be mindful that the compilations contained herein of arguments that have long been approved in Arizona will not always be safe territory. The majority in the Arizona Supreme Court has been regularly overruling long standing precedents and the changes may not go in favor of the state.

II. WIDE LATITUDE

It is well-settled law that "[a] prosecutor has wide latitude in presenting arguments to the jury." *State v. Velazquez*, 216 Ariz. 300, 311, ¶ 48, 166 P.3d 91, 103 (2007), *quoting State v. Morris*, 215 Ariz. 324, 337, ¶ 58, 160 P.3d 203, 216 (2007).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).
State v. Jones, 197 Ariz. 290, 4 P.3d 345 (2000).
State v. Leon, 190 Ariz. 159, 945 P.2d 1290 (1997).
State v. Edmisten, 220 Ariz. 517, 207 P.2d 770 (App. Div. 2 2009).
State v. Palmer, 219 Ariz. 451, 199 P.3d 706 (App. Div. 1 2008).
State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

III. PROPER COMMENTS

The wide latitude allowed in closing argument includes:

1. inferences and fair comments upon the evidence; *State v. Harrod*, 218 Ariz. 268, 278, ¶ 35, 183 P.3d 519, 529 (2008);
2. comments on the defense's failure to call witnesses or present contradicting evidence; *State v. Edmisten*, 220 Ariz. 517, 525, ¶ 26, 207 P.3d 770, 778 (App. Div. 2 2009);
3. the use of excessive or emotional language; *State v. Jones*, 197 Ariz. 290, 305, ¶ 37, 4 P.3d 345, 361 (2000);
4. comments on the testimony or demeanor of the defendant; *See State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985);
5. comments on the credibility of the defense;
6. discussions of the law;
7. actually reading from the transcript; or, *State v. Hauss*, 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984);
8. commenting upon the defense's opening statements.

Each of these is a tool, an avenue, for presenting necessary information to the jury. Remember: If the defense fails to timely object to these comments, the right to raise the error on appeal is waived unless there is fundamental error. (See "Effects of Improper Argument," this manual.) Each of these "tools" is discussed

on the following pages and cases which illustrate what the court has accepted in closing argument are included.

A. Inferences and Fair Comments Upon the Evidence

The courts are willing to allow many comments as long as they are fair comments on evidence properly before the jury or fair inferences from the evidence properly before the jury. The following cases are a sampling of acceptable comments. Of course, a complete listing is not possible due to space restrictions. The actual comments of the prosecutors and the court follow the listing for your further reference.

State v. Martinez, 218 Ariz. 421, 189 P.3d 348 (2008).

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996).

State v. Henry, 176 Ariz. 569, 863 P.2d 861 (1993).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993).

State v. Garcia, 165 Ariz. 547, 799 P.2d 888 (App. Div. 1 1990).

State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).

State v. Carrillo, 156 Ariz. 125, 750 P.2d 883(1988) (prosecutor may comment on defendant's invocation of rights pertaining to voluntariness issue—BE CAREFUL!).

State v. Kreps, 146 Ariz. 446, 706 P.2d 1213 (1985)(defendant was lazy, living off victim).

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1 984)(how would you feel if you were the victim? - loss of evidence).

State v. Buchholz, 139 Ariz. 303, 678 P.2d 488 (App. Div. 2 1983)(calling the defendant a "fence" where purchases of stolen goods took place over a period of eight months).

State v. Snowden, 138 Ariz. 402, 675 P.2d 289 (App. Div. 2 1984)(calling the defendant a "pro").

State v. Totress, 107 Ariz. 18, 480 P.2d 668 (1971) (argument that defendant molded his testimony to fit prior witnesses).

State v. Contreras, 122 Ariz. 478, 595 P.2d 1023 (App. Div. 2 1979)(victim denied defendant's involvement to appease defendant).

State v. Dillon, 104 Ariz. 33, 35, 448 P.2d 89 (1968)(asking rhetorically if the jurors would forget the perpetrator if the crime were committed against them).

State v. Canisales, 126 Ariz. 331, 615 P.2d 9 (App. 1980) (calling the defendant "punks").

State v. Jaramillo, 110 Ariz. 481, 482, 520 P.2d 1105 (1974) (referring to "departmental reports" as a source of evidence).'

State v. Maddasion, 24 Ariz.App. 492, 539 P.2d 966 (App. Div. 1 1975)(calling the defendant a "dealer in heroin").

State v. Miniefield, 110 Ariz. 599, 522, P.2d 25 (1974) (calling defense witnesses "liars").

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981) (implying the defense was based on perjury).

State v. Bohn, 116 Ariz. 500, 570 P.2d 187 (1 977)(Who was doing the selling?).

State v. Galbraith, 1 14 Ariz. 174, 559 P.2d 1089 (App. Div. 1 1977) (as distinguished from personal opinion).

State v. Jordon, 105 Ariz. 250, 462 P.2d 799 (1969) (implying the red stains were blood stains)(See also *State v. Bailey,* 132 Ariz. 472, 647 P.2d 170 (1982)).

State v. Labarre, 114 Ariz. 440, 561 P.2d 764 (1977) (motive to lie in prior trial).

State v. Blodqette, 121 Ariz. 392, 590 P.2d 931 (1979) (implication that alibi witness was in fact accomplice).
State v. Jones, 123 Ariz. 373, 599 P.2d 826 (App. Div. 2 1979) (implication that a different type of victim might not have survived the attack).

State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1 980)(defendant might kill the witness).

State v. White, 115 Ariz. 199, 564 P.2d 88 (1 977)("We deal in common sense.").

State v. Landrum, 112 Ariz. 555, 544 P.2d 669 (1976) (characterize the defense as an "alibi").

State v. Brady, 105 Ariz. 592, 469 P.2d 77 (1970)(proving an element).

B. Distinguished from Comments on the Defendant's Failure to Take the Stand

"[T]he Fifth Amendment is violated only if the statements will call the jury's attention to the fact that defendant has not testified in his own behalf." (citations omitted) *State v. Pierson*, 102 Ariz. 90, 91, 425 P.2d 115, 116 (1967). See also *State v. Karstetter*, 110 Ariz. 539, 521 P.2d 626 (1974).

State v. Whitaker, 112 Ariz. 537, 542, 544 P.2d 219 (1975).
State v. Karstetter, 110 Ariz. 539, 521 P.2d 626 (1974).
State v. Dutton, 106 Ariz. 463, 478 P.2d 87 (1970).
State v. Martinez, 130 Ariz. 80, 634 P.2d 7 (1981).
State v. Morgan, 128 Ariz. 362, 625 P.2d 951 (1981).
State v. Washington, 132 Ariz. 429, 646 P.2d 314 (1982).
State v. Tiebeault, 131 Ariz. 192, 639 P.2d 382 (1981).

C. Inferences and Fair Comments Upon the Case

1. Implying That Defendant's Alibi Was A Joking Reference To The Crime

State v. Martinez, 218 Ariz. 421, 189 P.3d 348 (2008).

PROSECUTOR

> Prosecutor said that Defendant, who was charged with the first-degree murder of Francisco Aguilar, provided his friends "a sickening excuse to offer up to the police officers – we were at Cisco's barbecue – so he cannot be connected with this crime."

COURT

> The police interviews and free talks emphasized by [Defendant] on appeal do not rule out the possibility that Martinez did, in fact, intend the alibi to refer to the crime.

2. Suggesting A Possible Unrecorded Conversation Between Rape Victim And Detective

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

FACTS

Alleged rape victim recounted the circumstances of the rape to detectives in one taped interview. In the next taped interview she recanted her allegations.

PROSECUTOR

> The testimony says that a lot of things happened between those two tapes. Most of what is of interest to us happens between those two tapes, was detective Tate yelling and screaming on the tape? No. Might something have happened in the interim? That's for you to decide.

COURT

A reasonable inference could be drawn that some conversations that were not taped occurred between the alleged rape victim and detective. No testimony was presented that all of their conversations were recorded. And in the second tape the detective suggested that some conversations had occurred off tape.

3. Stating That Defendant Gave Evasive Answers To Police Questions

State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996).

PROSECUTOR

> In this particular case, Kemp [Defendant] and Mr. Logan obviously were out together as Kemp told Detective Salgado when he talked to him. He was evasive in some of the areas he was giving answers to.

COURT

> This argument [that Defendant answered questions evasively] is supported by the statements Kemp made to the police after his arrest and before he asked for a lawyer. Kemp said that he was 'cruising' apartment complexes. He said there was 'a very good possibility' that he was at the apartment form which Juarez was abducted. He said he was going 'in and out' of various apartment complexes.

4. Suggesting That Accomplice Had Accused Defendant Of Committing The Crime

State v. Henry, 176 Ariz. 569, 863 P.2d 861 (1993).

FACTS

Henry [Defendant] and Foote were tried separately for murder. Defendant testified that Foote was solely responsible for the murder.

PROSECUTOR

> They were trying to get away only they didn't make it. That's why they resorted – both of them – to the basic defense you've got in this situation. The other guy did it. The evidence in this case shows they both did it.

COURT

It was not inappropriate for the prosecutor to suggest that Foote had accused Henry. "At trial, Henry elicited testimony from a Mohave County Jail inmate who claimed to have overheard Foote say he was blaming Henry for the murder."

5. Defendant May Have Tortured The Victim.

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993).

PROSECUTOR

After the victim's hands were tied, she may have been "forced into some sort of torment."

COURT

> The nine-year-old victim was abducted, taken to a remote area, her clothes removed and scattered, her hands tied, and her head beaten. Such evidence would permit a jury to infer that she had been subject to both physical and emotional torment.

6. Victim Was Robbed "Immediately" After He Was Killed.

State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).

PROSECUTOR

Victim was robbed "immediately" after he was killed and he was robbed at Defendant's campsite.

COURT

> The record shows that Pritchard [Victim] had an EMT badge while he was at the [Defendant's] campsite shortly before the shooting and that [Defendant] took it from him after the shooting. Later, [Defendant] used Pritchard's EMT badge in the Jones/Smith robberies.

7. Argument That Defendant Molded Testimony To Fit Prior Witnesses.

State v. Totress, 107 Ariz. 18, 480 P.2d 668 (1971).

PROSECUTOR

> Now, if you will recall at the beginning of this case, the witnesses were excluded from this courtroom.

COURT

Proper argument and no objection.

8. Victim Denied Defendant's Involvement to Appease Defendant.

State v. Contreras, 122 Ariz. 478, 595 P.2d 1023 (App. Div. 2 1979).

DIRECT EXAMINATION

Prosecutor elicited testimony regarding a prison code forbidding inmates from testifying against each other under peril of death.

PROSECUTOR

The prosecutor argued that the victim denied defendant's involvement to appease the defendant.

COURT

A reasonable inference from the facts was "that the victim denied appellant's involvement to avoid further reprisals from him."

9. Asking Rhetorically if the Jurors Would Forget the Perpetrator if They were the Victim

State v. Dillon, 104 Ariz. 33, 35, 448 P.2d 89 (1968).

PROSECUTOR

If someone did something like that to you or to your wife, do you think she could remember who it was?

COURT

It was merely an argument to the jury of counsel that the nature of the crime ,was such that a prosecutrix would be so impressed that her identification of defendant was completely reliable. Such remarks did not constitute error under the facts of this case.

10. Prosecutor Calling Defendant Names

State v. Kreps, 146 Ariz. 446, 706 P.2d 1213 (1985).

PROSECUTOR

Sure, he's never been arrested before but is he such a good guy? He didn't work for two and a half years. Sure, it's a tough time, but he lived off that girl for most of the time, he wasn't working, he was a lazy person that sat around the apartment all the time feeling sorry for himself.

COURT

The argument was a fair comment on the evidence and defense counsel waived all but fundamental error by

failing to object.

State v. Rodriquez, 145 Ariz. 157, 700 P.2d 855 (App. Div. 1 1985), *overruled on other grounds by State v. Ives,* 187 Ariz. 102, 927 P.2d 762 (1996).

Prosecutor's remarks that defendant was "the guilty one and that justice and conviction were one in the same" were not fundamental error. Defendant's attorney did not object to the statement, waiving any claim of error. (Be careful on this one. If the attorney had objected, the decision might have gone the other way.)

State v. Buchholz, 139 Ariz. 303, 678 P.2d 488 (App. Div. 2 1983).

Comments by the prosecutor which the defendant claimed mislabeled him as a "fence" were within allowed limits where defendant had been charged with making five purchases of stolen property over an eight month period, but not with trafficking in, stolen goods.

State v. Snowden, 138 Ariz. 402, 675 P.2d 289 (App. Div. 2 1984).

PROSECUTION

> Do you think its credible that a pro, as we know Kemp is, is going to let him sit out there--I don't mean to be racial about this, please believe me on that--do you think you're going to leave a black guy out there in a car, or a big car while a robbery is going on? Do you really think that Kemp, who is a pro, is going to let him sit out there for five minutes, six minutes, seven minutes where he can be seen. Not in a million years.

COURT

No error. The argument did not focus the attention of the jury on matters not properly before it.

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).

DEFENSE

> How would you like to be sitting at the defense table charged with a crime, there's no physical evidence. You've got an eye witness. That's the sum total of the evidence. You can't really cross-examine them. How would you like to be sitting there thinking the police could have put something in a plastic bag and saved it for a couple of months and that could prove your innocence? You can't get at it. What would you be feeling right now?

PROSECUTION

> His big complaint in this area is how would you feel if you were Gary Mitchell and you're on trial for a case like this and the enzymes were lost. I would just like to give you the converse of that and say how would you feel if you were Cheryl Morrison and you picked out the man that raped you and you said this is him, there is no doubt in my mind about that, and the jury found the guy not guilty just because the police didn't refrigerate those enzymes? How would that feel? That would be a miscarriage of justice if that were the case, if Cheryl Morrison had to find out this man was found not guilty just because the police had not refrigerated those enzymes.

COURT

–

The prosecutor's arguments were merely responsive to the defense arguments and did not result in prejudice.

State v. Canisales, 126 Ariz. 331, 615 P.2d 9 (1980).

FACTS

Defendant and friends had been driving around and drinking before apparently using a nightstick in assaulting the victim.

PROSECUTOR

> Ladies and gentlemen, what probably happened is, what these three guys were doing, is a couple of them had been drinking, they were out in their car on their way home, maybe driving around. What these -- they're just punks, and they were looking for a fight.

COURT

> Not only do we find that the characterization of the defendants as 'punks' was not so objectionable as to require reversal, we hold that it was not an improper statement at all ... [T]he use of the word'punk' constituted a fair comment on the state's theory of the case and the evidence which it had presented . . .

State v. Jaramillo, 110 Ariz. 481, 482, 520 P.2d 1105 (1974).

PROSECUTOR

> The State is reduced to getting the supplier, the real source, the department reports say that it's the man sitting right there.

COURT

> The considerable latitude allowed to counsel in argument includes drawing reasonable inferences from the evidence.
>
> It has been held that characterizations of the defendant as 'a professional robber,' and a 'sex maniac,' are not improper comments in argument by a prosecutor if warranted by the evidence.
>
> The remark about 'departmental reports' was never alluded to nor was there any other connection after the original reference. There was no prejudice; further the court instructed the jury that any comment of counsel which had no basis in the evidence was to be disregarded.

State v. Maddasion, 24 Ariz.App. 492, 539 P.2d 966 (App. Div. 2 1975).

PROSECUTOR

> Aside from being a prosecutor, ladies and gentlemen, I am a concerned citizen like most of you are or should be. I submit to you that Mr. Maddasion is a car salesman. Mr. Maddasion is a dealer in heroin, a white-collar criminal, ladies and gentlemen, and I

submit to you that is a fact and I submit to you that the state has provided that he sold the six rolls of heroin, that he intended to do it.

COURT

Justifiable inferences from the evidence.

State v. Miniefield, 110 Ariz. 599, 522, P.2d 25 (1974).

COURT

Next, the defendant urges it was reversible error for the county attorney to call defense witnesses 'liars'. There is considerable latitude allowed to counsel in argument. This includes drawing reasonable inferences from the evidence. The evidence disclosed that at least one defense witness was shown to have made contradictory statements and other defense witnesses had their testimony concerning the drunkenness of the defendant rebutted by prosecution witnesses. Although we do not approve of the language of the prosecutor, we do not find it so offensive, inflammatory or prejudicial as to require reversal.

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981).

PROSECUTOR

The prosecutor implied that the defense was based on perjury to conform to defendant's theory of self defense.

COURT

We have stated that '[c]ounsel may comment on the credibility of a witness where his remarks are based on the facts in evidence,' and that counsel can argue all reasonable inferences from the evidence. We see the objected-to comments as falling within one or the other of these two rubrics.

See also, *State v. Robinson*, 127 Ariz. 324, 620 P.2d 703 (1980).

11. Intimating that Heroin Sale was Part of Crime when Charged with Possession

State v. Bohn, 116 Ariz. 500, 570 P.2d 187 (1977).

DEFENSE ARGUMENT

The fact that Phillips Bohn went into No. 10, to buy some heroin, bought some heroin, injected it in his veins, the police knock down the door, and catch him and he said, 'I just came to shoot up.' That's what he said. And, I think that's what he did. And, I think you can infer that that's what he did. You can't convict him for what he shot up with.

The defense has said, 'Well, he told the police he is just dropping through for a fix.' He is dropping into a room where heroin is being sold. That's not before you here, this is a possession. This isn't possession for sale, or sale of heroin, but I will suggest to you, if any heroin is being sold in that room, you ask yourselves, when you go back to the jury room, 'Who was doing the selling?' Was it the two guys in the street clothes, or was it the guy walking around in his underwear, with all his personal effects scattered throughout the room? Or maybe, ask yourselves, maybe all three of them were in on it?

For whatever reason the money is there. We know, I guess defense counsel mentioned that some selling was going on in there. I tell you one thing, the only person that claimed the money was the defendant.

COURT

The state's comments did not breach the limits of propriety for a closing argument. Generally, one may draw inferences from the evidence presented at trial. The facts in evidence disclosed that while appellant claimed the $213.00 under the mattress, he denied ownership of the heroin, claiming he was merely at the scene to purchase. One inference which may be drawn from this evidence is that appellant had been selling heroin, and, therefore was the possessor of the remaining drugs.

12. As Distinguished From Personal Opinion

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).

The comment by the prosecutor that the "victim's care in not identifying anyone" in the first line-ups enhanced the reliability of her identification when finally made was a "permissible interpretation of the evidence," and was not a statement by the prosecutor of his personal opinion.

State v. Galbraith, 114 Ariz. 174, 559 P.2d 1089 (App. Div. 1 1977).

PROSECUTOR

I submit to you that the facts presented in this case show beyond a reasonable doubt that the defendant did, in fact, make a false telephone message, and the elements of the statute have been clearly satisfied.

COURT

The State argues that impropriety occurs only when the prosecutor expresses his personal opinion of appellant's guilt. The State urges that the prosecutor's remarks were not expressions of a personal opinion in regard to the appellant's guilt, but rather were justifiable inferences from the facts presented to the jury. We concur that the statement by the County Attorney was not error.

13. Implying Red Stains Were Bloodstains

State v. Jordan, 105 Ariz. 250, 462 P.2d 799 (1969).

PROSECUTOR

In this case, there was contact. In fact as you examine State's Exhibit I in evidence, ladies

and gentleman, I think you will notice stains here. And again what I say is not evidence, but these are red stains.

COURT

We hold that the prosecutor's comments concerning the stains on the pool cue do not constitute reversible error. The State was trying to show that Roy Quinn had been struck by the pool cue wielded by defendant. The prosecutor could point to the condition of the pool cue to buttress this theory. Since the record is replete with testimony that Roy Quinn was bleeding heavily from his injury, the jury was entitled to infer that the stains on the pool cue, alluded to by the prosecutor, were blood stains.

But see, *State v. Bailey*, 132 Ariz. 472, 647 P.2d 170 (1982), where the court held that since there was no evidence that the red stains on the rock were blood, it was error to refer to "blood on the rock."

14. Motive to Lie in Prior Trial

State v. LaBarre, 114 Ariz. 440, 561 P.2d 764 (1977).

FACTS

The trial court had ordered the State to refrain from making any reference to the verdict in the prior robbery trial.

PROSECUTOR

Again, he got on the stand and said, 'I didn't rob them.' He did that, of course, in an effort to get himself acquitted in the robbery trial. His motive is clear for perjuring himself.

When you judge why a defendant did a particular thing, you can consider what motive he may have had for doing it.

And, in this case, it's clear, the motive for committing perjury was an attempted acquittal of the armed robbery. But, that doesn't excuse it.

(An objection and motion for mistrial were made and refused.)

COURT

Appellant here is apparently contending the remark of the prosecutor improperly left the impression with the jury that the defendant had been acquitted of the robbery charge, and that such a notion would make the jury more likely to convict on the perjury charges. We need not speculate as to whether the comment did tend to have that effect. The comment itself related not to the substance of the verdict, but to the defendant's motivation for giving the allegedly perjured testimony, and we see no abuse of discretion by the court in denying the motion for mistrial.

15. Implication That Alibi Witness Was An Accomplice

State v. Blodgette, 121 Ariz. 392, 590 P.2d 931 (1979).

The prosecutor questioned the existence of an absent defense witness and implied that defendant's alibi witness was in fact an accomplice in the burglary.

COURT

Reasonable inference.

16. Implication A Different Victim May Have Been Killed

State v. Jones, 123 Ariz. 373, 590 P.2d 826 (App. Div. 2 1979).

PROSECUTOR

> I submit to you that (it) may be fortunate in this case, being these were prostitutes. A normal woman might not have survived the action–" (At this point, an objection was sustained.) ... The women were sexually hardened.

COURT

Fair comment on the evidence.

17. Defendant Will Kill Witnesses

State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980).

PROSECUTOR

> Mr. Duber [defense counsel] has asked you to find Mr. Marvin guilty of voluntary manslaughter, you might as well sentence to death anybody who ever touched Mrs. Marvin, as well as sentence to death Gerry Marvin [victim and defendant's wife].

COURT

> We have frequently held that in closing arguments, counsel may draw reasonable inferences from the evidence elicited. Considering the fact that appellant had testified that on several occasions he had threatened to kill his wife and anyone he found with her, we hold that the prosecutor's comment was permissible as a reasonable inference from the evidence.

DISSENT (Gordon & Cameron)

The prosecutor implied that manslaughter carries a minimal sentence and that defendant will kill others if given a minimal sentence. Case should be reversed.

18. Common Sense

State v. White, 115 Ariz. 199, 203, 564 P.2d 88 (1977).

PROSECUTOR

We don't deal with percentages. We deal in common sense. We deal in facts, and we deal with the law. We are not mathematicians. We are human beings, each and every one of us, including the witnesses, are subject to the same frailties and imperfections. We don't remember everything the same way, except the fact that Mrs. Silvio was robbed and those two did it.

COURT

The statement is clearly a common sense reminder to the jury that minor discrepancies are bound to occur in testimony and the use of the word "we" in the last sentence is an unfortunate word choice rather than a personal opinion as to the defendant's guilt and was undoubtedly understood as such by the jury.

19. Characterized Defense as "Alibi"

State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986).

PROSECUTOR

The time of death. The Defendant has no alibi for the time of death. 2:00 to 4:00 in the morning the bars have closed. If he came home, went back to the bar, so Arlene missed him doesn't make sense. The bars have closed. He's got no alibi for the time of death.

COURT

Nonetheless, the defendant had indicated an alibi defense and we believe the comment of the prosecutor, though questionable, was a valid comment on evidence that defendant could have but did not present through the testimony of others.

State v. Landrum, 112 Ariz. 555, 544 P.2d 669 (1976).

PROSECUTOR

The prosecutor used the word "alibi" to characterize the defense.

COURT

"[T]he word 'alibi' carries with it no prejudicial connotation" (and proper jury instruction given).

20. Proving an Element

State v. Brady, 105 Ariz. 592, 469 P.2d 77 (1970).

FACTS

In a trial for possession of heroin the defendant took the stand for the limited stipulated purpose of testifying as to voluntariness. On defense's direct the defendant admitted that he had taken heroin and some pills prior to his arrest.

PROSECUTOR

Mr. Brady at six-thirty on May 13, 1968, admits from the witness stand that he had possessed heroin and that he had taken a full paper of heroin. Certainly that's proof beyond any reasonable doubt that he possessed heroin on May 13, 1968.

MR. GONZALES: 'Your Honor, I'm going to object at this time. May I approach the bench for a second?'

THE COURT: 'You may.' (Conference at the bench.)

MR. PATCHELL: 'He told you from the stand that he didn't have a prescription for heroin. One of the elements of the crime is that it can be possessed on the prescription of a physician. Obviously he didn't have a prescription. He told you he didn't. The additional heroin that was found in the closet in the clothing is a tremendous amount of heroin. He obviously possessed that

"* * * I think that this State has more than borne the burden, assisted by the defendant himself, and the proof is certainly beyond any reasonable doubt. * * *"

COURT

The defendant had voluntarily testified that he was in possession of heroin which he had taken on May 13th. Although the defendant was permitted to take the stand before the jury for the limited purpose of testifying as to voluntariness of the statements made to the officers, he is bound by that testimony, and the jury was entitled to consider it. The county attorney's remarks therefore did not constitute error.

21. <u>As Distinguished From Comments Upon the Defendant's Failure to Take the Stand</u>

State v. Stuck, 154 Ariz. 16, 739 P.2d 1333 (App. Div. 1 1987).

PROSECUTOR

He told you, interestingly enough, something that you must keep in mind: That he has had access to the victim's tape recorded interview. He sat through and listened through everyone's testimony. He had five months before he ever told you anything about this alternate bondage defense. He can't claim I.D. as an issue, because the police got him just like that.

They drew down on him, they pulled him out of the truck within minutes of when Sirena called. I.D. went out the window. Plan of attack here, my defense, Sirena is kinky and she agreed to do this.

Then the defendant started getting this -- all this evidence, so that now after five months, now it's consent and she consented to bondage.

First, we do not believe that the five month hiatus of statements between June 10 and the trial constitutes an invocation of the right to silence.

Secondly, the prosecutor was not attacking appellant's silence, but rather his fourth version of the events which he testified to at trial. He was merely commenting on how the fourth story attempted to include all the facts which emerged during the discovery process. The prosecutor's tactic, in view of appellant's first three statements, was a permissible attack on appellant's testimony at trial, not a comment on any "silence" on appellants part.

State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986).

DEFENSE

He gave a taped statement to police officers. You are going to hear the tape ... He gave a [taped] statement right after he was arrested to the police explaining what happened ... this is the one Mr. Ramage-White contends is just filled with lies. Well, I want you to listen to it. You are going to have to pick out from all the testimony here the truth.

PROSECUTOR

And this up here shows he lied on another occasion. If the State--the people of the State of Arizona brought in a witness, put him on this chair, he made a statement like this and the defense attorney proved he lied to you
on significant details, you wouldn't listen to him.

COURT

As to the prosecutor's first statement, the trial court found that it was simply a comment highlighting that defendant's prior statement was not believable. We agree. The defense was the first to discuss the defendant's statement and urge its veracity. The prosecutor was seeking to attack the believability of defendant's statement, not to highlight his failure to testify. We feel this comment by the prosecutor was both a proper attack on defendant's statement and an invited reply to the opening statement of defense counsel.

State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986).

PROSECUTOR

The time of death. The Defendant has no alibi for the time of death. 1:00 to 4:00 in the morning the bars have closed. If he came home, went back to the bar, so Arlene missed him doesn't make sense. The bars have closed. He's got no alibi for the time of death.

COURT

We do not believe that the prosecutor's comment impermissibly created the inference that defendant did not take the stand and testify as to what he was doing during the time of the murder. The comment related only to the fact that the defendant in his statements to the

officers did not support the alibi defense...

State v. Whitaker, 112 Ariz. 537, 544 P.2d 219 (1975).

PROSECUTOR

You heard it from the witness-stand. You also heard something else. You heard Stephen Sylvester take this witness-stand and tell you that he was positive that the way he was telling you was the way it happened.

But nonetheless you must consider her testimony, another person who sat there, and told you that, as they recall it, the smaller gun, the gun the defendant had, fired first.

And this defendant, through Officer Metcalf' s statements that he made to Officer Metcalf, is asking you to believe that after he received massive wounds from a 16-gauge shotgun he reached into his belt, pulled out a gun and then fired.

He received them in the very same arm and shoulder that he is telling you, through Officer Metcalf, that he told Officer Metcalf, he fired the gun with.

And even if you accept the defendant's story, fire into a house that he can't see into?

COURT

We do not believe that these statements were improper comments upon defendant's exercise of his Fifth Amendment rights. The refusal to grant a mistrial was not error.

State v. Kerstetter, 110 Ariz. 539, 521 P.2d 626 (1974).

PROSECUTOR

There are only two people who know what happened on October 15, 1972 at the time this woman died. One of them is dead. But the statement which is in evidence, that the defendant made to the police . . .

The only evidence we have from anyone regarding what exactly happened between these two is from the defendant as he gave it to the police and as he gave it to his psychologist and his psychiatrist . . .

COURT

Defendant's argument on this issue is easily answered. The prosecutor's statement was not actually a comment on defendant's failure to take the stand.

We must again point out that defendant's only defense was insanity. As to the fact of his committing the crime charged, there appears to be no question. Even a flat statement as to defendant's failure to take the stand, cannot in this context be considered prejudicial.

State v. Dutton, 106 Ariz. 463, 478 P.2d 87 (1970).

FACTS

Defendant took the stand and denied his guilt in a rape case.

PROSECUTOR

> I want you to try to think back over the inconsistencies as Mr. Whitney [defense counsel] has called them, in this girl's testimony, and tell me where they come from. They come from one place and one place only, the story that Mr. Dutton told you.
>
> If there are any inconsistencies they are there because they are inconsistent with the account which he gives, the account which he gives, of course, is different. And what other account could he give? He had to say something. He did say something. And he made it fit.
>
> And he did just like his attorney, Mr. Whitney, did, when asked about a fact that caused him trouble, he said, 'Well, I don't know about that. I don't remember. Well, maybe I said that at the preliminary hearing, but I was confused. It could be that.'
>
> Seated there, on the other hand, is a convicted felon, a man who under oath said, on Mr. Whitney's question, 'Did you have sexual intercourse with her,' 'No, I did not;' who said here before you, 'Yes, I did.'
>
> He is lying in one place or the other. He has committed perjury. And I tell you and submit to you, is a convicted felon, a perjurer. And he should be, today, a rapist.
>
> MR. WHITNEY: 'I object to that. He said a convicted felon and a perjurer.'
>
> THE COURT: 'He hasn't been convicted of perjury and that should not be inferred by the jury from the statement of counsel.'

COURT

> These remarks alluded to the presence of the defendant which defense counsel alleges is prohibited in *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965). Griffin is not applicable because in that case, the prosecutor commented on the fact the defendant had not taken the stand, to deny his guilt. Here the defendant did testify, and the prosecutor was not precluded from commenting on defendant's testimony. Attorneys have wide latitude in their remarks to the jury, provided they are supported by the evidence. *State v. Hannon, supra.* There is no merit in defendant's contention.

State v. Martinez, 130 Ariz. 80, 634 P.2d 7 (1981).

PROSECUTOR

The prosecutor argued that the theory expressed by the defense attorney during the defense argument did not come "from the defendant's mouth."

State v. Morgan, 128 Ariz. 362, 625. P.2d 951 (1981).

PROSECUTOR

The prosecutor argued that the defense could choose to present no evidence.

COURT

Where other witnesses were available and where defense counsel had argued that jurors should draw no unfavorable inference from the defendant's failure to testify, there was no impermissible comment on the defendant's failure to testify.

State v. Washington, 132 Ariz. 429, 646 P.2d 314 (1982).

PROSECUTOR

The prosecutor argued that the jury should compare the size of the defendant to that of the victim.

COURT

Failure to object constituted waiver. Moreover, the defense attorney had injected the issue when he had the victim view the defendant during cross. (The court ignored the fact that the size of the defendant is non-testimonial and the trial court could have ordered the defendant to stand and allow the witness to approach

State v. Thibeault, 131 Ariz. 192, 639 P.2d 382 (1981).

PROSECUTOR

The prosecutor mentioned the fact that the defendant was absent during the trial. (This is known as "invoking the Sonora defense" in Cochise County)

COURT

The defendant was not entitled to a mistrial since the absence was obvious.

NOTE: Caution should be exercised here -- commenting on the absence is a different matter than mentioning it.

22. Comments On Matters Not In Evidence

State v. Cardenas, 146 Ariz. 193, 704 P.2d 834 (App. Div. 2 1985). There was no error where the prosecutor compared the defendant's crime to other, more violent episodes of sexual molestation in voir dire, opening statement, and closing statement.

State v. Rosthenhausler, 147 Ariz. 486, 711 P.2d 625 (App. Div. 2 1985). The rebuttal argument of the prosecutor to a "red herring" argument by the defense attorney was permissible.

Although the argument may have been confusing on whether a simulated gun is sufficient in aggravated assault, we do not find prejudice. The simulated gun argument is a red herring. Nothing in the record

suggests any of the guns used were anything but real. Further, the court's instructions limited the simulated gun to the crimes of armed robbery.

State v. Lucas, 146 Ariz. 597, 708 P.2d 81 (1985).

The closing argument of the prosecutor characterizing the defendant's testimony as a "snow job" did not draw the attention of the jury to matters not before it nor did it improperly influence the jury. The remarks were in refutation of the defense attorney's attacks on two state witnesses and well within the wide latitude allowed in argument.

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984), *overruled in part by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

PROSECUTION

> Now, to put that in maybe a little simpler way, if you're satisfied of his guilt beyond a reasonable doubt with or without that evidence, then you can go ahead and find him guilty whether it exists or not, and I would submit to you that even if the crime lab was able to analyze those enzymes it would've come back being the same enzyme group that he is.

(Court overrules a general objection made by defense counsel.)

> Now, as I said, there is no evidence one way or the other. I am submitting to you, giving you an inference that that would be the case because he has been identified as the man that left that semen in Cheryl Morrison. I submit to you that it would be the same result as the blood test, you know, the blood was analyzed and it came back to be his and if the enzymes are analyzed I submit to you that would come back to be his, too, because he's the one that raped her.

COURT

> Appellant contends that the prosecutor's argument was an improper comment on matters not entered into evidence because there was not evidence as to what the result of the semen tests were since the evidence had been destroyed. We do not agree. It seems clear that the prosecutor in this case was not commenting upon matters not introduced into evidence. He was not saying that the enzyme test in fact showed appellant to be the assailant. He <u>was merely asking the jury to draw an inference based upon all the rest of the evidence in the case, and attempting to counter the defendant's argument that because of the loss or destruction of the evidence, it could be inferred that the results would have shown that the defendant was not the rapist.</u>

(Emphasis added)

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983).

PROSECUTOR

> I would also suggest to you that the criminal record of the defendant might tell you something about his predisposition to commit a crime. We're talking about somebody who has three prior felony convictions. This is somebody who obviously has been through the system, is aware of what crime is.

(Objection by defense is sustained.)

COURT

> As a general rule, evidence of crimes other than those for which defendant is being tried is not admissible because of the questionable relevancy of the evidence and prejudice to defendant. . . .
>
> As the defendant's prior convictions were not admitted into evidence to show motive, intent, absence of mistake or accident, common scheme or plan or identity, it was improper for the prosecutor to argue to the jury that defendant's prior felony convictions indicated a predisposition to commit the crime. . . .
>
> As the prosecutor's remarks were brief, and the trial court instructed the jury that defendant's prior felony convictions could not be considered to prove that he had a propensity to commit crimes, we find it unlikely that the jury was influenced by the prosecutor's remarks. Therefore, we find that the remarks of the prosecutor, while improper, constituted harmless error under the circumstances of this case.

23. Use of Invocation of Miranda on Issue of Voluntariness

State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988). The defendant argued his confession was involuntary because he was incapable (incompetent-retarded) of understanding his *Miranda* rights. With the court's permission, the prosecutor elicited testimony from a police psychologist about defendant's invocation of his *Miranda* rights after speaking with the police for a period of time. The prosecutor used this testimony in final argument.

PROSECUTOR

> Clearly Hector Carrillo knew he didn't have to talk tothem [the investigating officers]. What does he say when Detective Lowe comes in, I'm not going to answer any more questions.

On appeal, the defense claimed this was an unconstitutional comment on defendant's invocation of his constitutional right to remain silent. The Arizona Supreme Court disagreed.

COURT

> The evidence was relevant to the key issue in the case--the voluntariness and reliability of defendant's confession, which was the only substantial evidence connecting him with the crime. On final argument, the prosecutor pressed the point home to the jury. There was nothing incidental or accidental about the entire procedure.
>
> [I]n the present case, Carrillo claimed he had not understood his rights and had not made a knowing waiver of his rights. When Carrillo stopped the final interrogation session and sought the aid of counsel, he vividly demonstrated an understanding of his predicament and of his constitutional rights. . . . We do not believe that either *Doyle* or *Wainwright* forbids the evidentiary use made in the present case.
>
> We do not believe the implicit promise of freedom from penalty recognized in *Doyle* and *Wainwright* embraces the concept that defendant may simultaneously claim his rights and, without fear of contradiction, claim that he did not understand the rights he claimed. We hold that the evidence of exercise of *Miranda* rights was admissible on the question of comprehension of those rights.

D. Comments on the Defense's Failure to Call Witnesses or Present Contradicting Evidence

A prosecutor may properly argue that the state's evidence is uncontradicted and comment upon the defense failure to call witnesses who could have supported the defendant's case. The only limitations upon this rule are:

The comments must not attempt to make affirmative evidence of guilt out of defense counsel's ethical behavior in refusing to call witnesses which may perjure themselves. *State v. Long*, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986); see also, *State v. Harrison*, 195 Ariz. 28, 34, 985 P.2d 513, 519 (App. Div. 1 1998).

Such comments must not be calculated or intended to direct the attention of the jury to the defendant's failure to avail himself to his right to testify. *State v. Berryman*, 106 Ariz. 290, 475 P.2d 472 (1970).

The witness(es) must be legally (competent) and practically (within the U.S.) available.

Arizona permits a prosecutor to discuss the failure of the defense to call witnesses even when the defendant is the only person who could have contradicted the State's case. *State v. Karstetter*, 110 Ariz. 539, 521 P.2d 626 (1974) (careful on this one).

Following are several categories of permissible comments. Each is followed by a listing of cases which are examples of the subject covered in the category. The actual comments and quotes follow in the order presented below:

1. "It is Uncontradicted, Uncontroverted, Uncontested, Unchallenged etc."

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).
State v. Covington, 136 Ariz. 393, 666 P.2d 493 (1983).
State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967).
State v. Ceja, 113 Ariz. 39, 546 P.2d 6 (1976).
State v. Adair, 106 Ariz. 58, 470 P.2d 671 (1970).
State v. Moreno, 26 Ariz. 178, 549 P.2d 252 (App. Div. 2 1976).
State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974).
State v. Byrd, 109 Ariz. 10, 503 P.2d 958 (1972).
State v. Acosta, 101 Ariz. 127, 416 P.2d 127 (1966).

2. "What Evidence Has the Defense Presented?"

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686 (App. Div. 2 2008).
State v. Garcia, 173 Ariz. 198, 840 P.2d 1063 (App. Div. 2 1992).
State v. Smith, 146 Ariz. 491, 707 P.2d 289 (1985).
State v. Fuller, 143 Ariz. 571, 694 P.2d 1185 (1 985)(prosecutor's opinion that there was no positive or exculpatory evidence).
State v. Moya, 140 Ariz. 508, 683 P.2d 307 (App. Div. 1 1984) (comment on failure by defense to call a witness referred to in opening argument).

State v. Berryman, 106 Ariz. 290, 475 P.2d 472 (1970)(What evidence has the defense presented?).
State v. Harrington, 27 Ariz. 663, 558 P.2d 28 (App. Div. 1 1976)(defense called only one witness).

3. "Is the Defense Able To Come Up With a Reasonable Alternative Explanation?"

State v. Thornton, 26 Ariz.App. 472, 549 P.2d 252 (App. Div. 2 1976).

4. "Where Were the Defense Witnesses?"

State v. Petzoldt, 172 Ariz. 272, 836 P.2d 982 (App. Div. 2 1991).
State v. Smith, 146 Ariz. 491, 707 P.2d 289 (1985).
State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1 983)(failure to call witnesses and exercise subpoena power).
State v. Cozad, 113 Ariz. 437, 556 P.2d 312 (1976).
State v. Condry, 114 Ariz. 499, 562 P.2d 379 (1977).
State v. Flynn, 109 Ariz. 545, 514 P.2d 466 (1973).
State v. Hatten, 106 Ariz. 239, 474 P.2d 830 (1970).

5. "If There Was Evidence, Why Didn't The Defendant Produce It?"

State v. Herrera, 203 Ariz. 131, 51 P.3d 353 (App. Div. 2 2002).
State v. Galbraith, 114 Ariz. 174, 559 P.2d 1089 (1977).
State v. Hinkle, 26 Ariz.App. 561, 550 P.2d 115 (1976).

6. The Insanity Defense

State v. Karstetter, 110 Ariz. 539, 521 P.2d 626 (1974).

7. Fingerprints

State v. Lee, 114 Ariz. 101, 559 P.2d 657 (1976).

SUMMARIES

1. It is Uncontradicted, Uncontroverted, Uncontested, Unchallenged, etc.

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

PROSECUTOR

> It is replete in the record how many times [T.S.] said I didn't want them to do that. I told them I ain't having sex with y'all. I told you, I didn't want to be in that house with y'all. I told them I don't want to do this. Over and over and over again she said, I don't want to do this. *There is no evidence in this record, no evidence from anyone who was there on the 15th and 16th that she said otherwise. No one.*

COURT

> We do not believe that the prosecutor's remarks in this case constituted an impermissible comment on Defendant's failure to testify. The prosecutor did not refer directly to any defendant's failure to testify. . . . Given that individuals other than the defendants were shown to be present at the scene, the defendants did not appear to be the only persons who could have explained or contradicted the evidence.

State v. Covington, 136 Ariz. 393, 666 P.2d 493 (1983).

FACTS

Defendants kidnapped victim at an Army NCO Club, took her off post to a residence and raped her. Consent was noticed. The consent defense was primarily based on testimony from third parties that the victim was sitting on defendant's lap at the NCO Club. There was evidence, other than from the victim, tending to negate consent.

PROSECUTOR

The prosecutor repeatedly argued that there was no credible evidence upon which the jury could find consent.

COURT

Where there was testimony from other witnesses and physical evidence relating to consent, or lack of consent, and where the prosecutor avoided reference to "direct evidence" and under the peculiar facts of this case, no error.

State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967).

** *Be careful here if the defendant is the only possible person able to controvert the evidence. See *State v. Still*, 119 Ariz. 549, 582 P.2d 639 (1978).

State v. Ceja, 113 Ariz. 39, 546 P.2d 6 (1976).

PROSECUTOR

> Let me ask you this question: What evidence has been presented to you? The only evidence that has been presented to you has been presented by the State. You have heard no other evidence. The evidence as presented to you is uncontradicted. That's the reason I say to you: We have proven the case beyond all doubt. You have nothing except what has been presented to you by the State.

COURT

Proper argument.

State v. Adair, 106 Ariz. 58, 470 P.2d 671 (1970).

PROSECUTOR

> We do have some confusion, that is quite true; the confusion is, did Mr. Taylor say this, or did Mr. Adair say this? Did Mr. Taylor say, 'I will blow your head off,' or did Mr. Adair say it?
>
> I cannot stress enough to you, that is not really the issue here. It is uncontradicted that both gentlemen were in there. There is no claim that they were not in there, none.
>
> It is uncontradicted that they were together. No contradiction period. So they were there. You have no evidence to indicate to the contrary; it is uncontradicted that Mr. Young was robbed. No evidence to indicate to the contrary. It is uncontradicted that there was –
>
> MR. CHESTER: 'Your Honor, I object to the county attorney's statement that it is uncontradicted. The defendant does not have to contradict anything.'
>
> THE COURT: 'The record may show your objection. Proceed.'
>
> What the contradictions are as to who said what, that is a contradiction at least as to Mr. Young's testimony. No, as I was saying, it is uncontradicted that he was robbed. It is uncontradicted what was taken. It is uncontradicted that he was told to lie on the floor. It is uncontradicted that the gentlemen were driving a blue Ford station wagon from 1955. It is uncontradicted they had been in there earlier in the evening, and it is uncontradicted they left.

COURT

> Upon careful examination of the transcript, we must reject defendant's contention in this regard. The prosecutor's closing speech must be taken in the context of the trial. During the trial defendant's counsel had endeavored to show contradictions and uncertainties concerning whether the defendant or his alleged accomplice had taken certain actions in the course of the robbery. The prosecutor's closing argument was thus aimed at stressing the matters which were not contradicted. Taken in context his remarks did not unduly call attention to defendant's failure to testify in his own behalf.

State v. Moreno, 26 Ariz.App. 178, 549 P.2d 252 (App. Div. 1 1976).

PROSECUTOR

There have been some issues in this case that the defense hasn't barked about, and they're largely the issues that are important, and the State called every police officer that heard that confession, and the State's evidence is uncontradicted.

COURT

The prosecutor's remarks in the present case were not intended to direct the attention of the jury to appellant's failure to testify.

State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974).

PROSECUTOR

The officers went on further and they stated – Now, everything the officers have said, everything they have said is uncontroverted. Everything they said. Officer Bernier, nobody challenged that. Nobody challenged what Officer Kohler said. Nobody challenged what Officer Sauerbrey said. Their testimony sits before you uncontroverted, uncontested.

COURT

The first statement by counsel for the State would fall under the rule as laid down in *Acosta*. The county attorney was bringing home the point that the officers had testified to certain facts and that evidence was uncontroverted, therefore justifying a jury verdict of guilt.

State v. Byrd, 109 Ariz. 10, 503 P.2d 958 (1972).

PROSECUTOR

The testimony of Mr. Moore has been uncontradicted.

There were three people there and he [Mr. Moore] is the one who brought these allegations and he is the primary person involved in telling you what happened.

He [Mr. Moore] testified upon the stand, and it has not been contradicted, that he had never seen these two guys before.

COURT

Unfortunately for defendant, his point of law has been repeatedly decided by this court in favor of the State. The whole rationale is clearly set forth in *State v. Berryman*, 106 Ariz. 290, 475 P.2d 472. The prosecution has a right to argue to the jury that the State's case has not been contradicted, even though the defendant is one of the persons who might have done so.

In our opinion, no error was committed by the prosecutor's arguments to the jury. Even if these remarks could be interpreted to be calculated to direct the jury's attention to the defendant's failure to testify, defendant is not in a position to urge error at this point because he failed to object to the argument at the time they were made.

State v. Acosta, 101 Ariz. 127, 128, 416 P.2d 127 (1966).

PROSECUTOR

> And, I ask you, is there anything in this case to show that there was not a purchase or there were not three purchases? There is nothing to show that...
>
> You heard the testimony of all the witnesses that were presented by the State in this particular case. And, it has not been controverted, except by the counsel's cross-examination. That is the only controversy of any of the testimony of State's witnesses ... because there is no other evidence to anything of the contrary [sic] except guilt.

COURT

> We find the statements complained of were not comments on defendant's failure to testify, but were merely general comments on the fact that the evidence was uncontradicted. The general context of the argument surrounding the statements complained of was not to allude to defendant's failure to testify, but rather to bring home the point that the evidence was, at least in the view of counsel for the State, uncontroverted, and justified a verdict of guilt.

2. "What Evidence Has the Defense Presented?"

State v. Sarullo, 219 Ariz. 431, 199 P.3d 686 (App. Div. 2 2008).

FACTS

In Sarullo's closing remarks, he argued that, "on some sort of psychological level," S. [victim] needed to see his suicide attempt as an assault.

PROSECUTOR

Prosecution noted that, while the burden of proof is on the prosecution, Sarullo failed to call any witnesses to support his theory.

COURT

> When a prosecutor comments on a defendant's failure to present evidence to support his or her theory of the case, it is neither improper nor shifts the burden of proof to the defendant so long as such comments are not intended to direct the jury's attention to the defendant's failure to testify. *State v. Martinez,* 130 Ariz. 80, 82-83, 634 P.2d 7, 9-10 (App. Div. 1 1981). Here, the prosecutor's comments did not refer to Sarullo at all, but rather to his failure to call expert witnesses to support his theory regarding the victim's psychological status.

State v. Garcia, 173 Ariz. 198, 840 P.2d 1063 (App. Div. 2 1992).

PROSECUTOR

Prosecution stated that no explanation had been offered for the fact that appellant's fingerprints were found

on the telephone and that he had possession of the pager.

COURT

> The comment was general in nature and not directed at appellant's personal failure to take the stand to provide an explanation. It was, as the state contends, more in the nature of a comment on appellant's failure to present exculpatory evidence in the face of strong evidence against him rather than a comment on his silence. As the state also notes, an explanation could have been given through sources other than appellant. [citations omitted].

State v. Fuller, 143 Ariz. 571, 694 P.2d 1185 (1985).

PROSECUTOR

> Defense counsel is trying to do the best he can to represent his client, and he's doing the best he can. However, the State has a lot of evidence. The defense has no duty to present evidence, that's true. They've presented no evidence, nothing positive. Their entire effort is to tear apart the State's case, to tell you that these eyewitnesses don't know what they saw. That's his purpose here today.

COURT

This was not a comment directed to the fact that defendant didn't testify. Rather, it "reflected prosecutor's opinion that the defense failed to present any positive or exculpatory evidence."

State v. Moya, 140 Ariz. 508, 6B3 P.2d 307 (App. Div. 1 1984).

FACTS

In a prosecution for forgery, the defense announced in opening argument that it would call a certain witness. That witness invoked the Fifth Amendment. The defense then proceeded to argue the incompetence of the victim and her testimony.

PROSECUTION

> Now, the case, according to Mr. Babbitt [defense counsel] in his opening statements, was authorization, this case involved, according to Mr. Babbitt, authorization. The State submits to you, ladies and gentlemen, there is virtually zero evidence as to authorization in this case.
>
> Mr. Babbitt comes up here to talk with you about authorization. That's what he told you he was going to tell you. He has to start finding it and the facts that were admitted in this case, ladies and gentlemen, in this particular case on this particular day, the forgeries are five. The authorization is zero. There is no evidence in this case whatsoever of authorization.
>
> ******
>
> Now, the next assertion Mr. Babbitt made was there might be some evidence Joe Maya told Susan Leedom certain things and in fact it would seem unusual to me if he hadn't told her some things to legitimize taking money from [the victim's] account. You don't have any basis

whether or not that was a truthful statement to Susan Leedom.

COURT

In the context of defense counsel's argument, it is clear that the prosecutor's remarks in closing argument constituted a comment about the lack of contradicting evidence, rather than appellant's failure to testify. Such comments are clearly permissible.

(Citations omitted.)

State v. Berryman, 106 Ariz. 290, 475 P.2d 472 (1970).

PROSECUTOR

Now what evidence has the defense presented to you today in this particular case to tell you that, or show you that the defendant is not guilty of this charge?

Their whole case consists of bringing a man in from Florence Prison that has been convicted, of his own admission, of approximately six or seven felonies.

And this is the whole testimony, the whole case of the defense. This is what they have shown you. This is what they have brought before you, the testimony of Mr. Gilbreath.

COURT

"This argument did not constitute a comment upon the failure of the defendant to testify."

State v. Harrington, 27 Ariz.App. 663, 558 P.2d 28 (App. Div. 1 1976).

PROSECUTOR

You may have noticed that most, if not all, of the defense case, as far as the actual moments ... rested upon the testimony of one individual, one James Lillard.

The only witnesses to the event of that night, whose testimony you have heard in this case, whose testimony may be trusted, is the testimony of one person, the next door neighbor lady, Mrs. Voise.

The only unbiased witness in this case has told you exactly how it happened....

(Emphasis added.)

COURT

In our view the comments did not have the effect of focusing the jury's attention on the fact that the defendant had not taken the stand sufficiently to require reversal on this ground.

3. "Is the Defense Able to Come Up With a Reasonable Alternative Explanation?"

State v. Thornton, 26 Ariz.App. 472, 549 P.2d 252 (App. Div. 2 1976).

PROSECUTOR

I am sure in every case, in any case that is tried in the criminal court, there is always going to be some doubt, but the concept is reasonable doubt. Now, we take that to mean that some doubt that you arrive at through your reasoning process, either from some significant defects, some significant gapping [sic] defect in the State's case or from some evidence, some positive evidence that has been presented by the defense. I don't think there is a defect in the State's case which would rise to the level of reasonable doubt when you consider the totality of the evidence which has just been summarized and which had previously been presented. I don't think the defense has come forward with anything which would rise to the level of reasonable doubt.

One thing that I would ask you to do in considering the summation of Mr. Sherman, in comparing it to what I have just said, I would ask you to measure Mr. Sherman's summation by this test: considering all the evidence in this case and considering also the possible lack of evidence, is the defense able to come up with a reasonable alternative explanation for the events that took place on or about January 10, 1975.

COURT

The prosecutor first stated that the defense failed to present any positive evidence that could engender a reasonable doubt. Far from being calculated to focus the jury's attention on the defendant's failure personally to testify, see, *State v. Rhodes*, 110 Ariz. 237, 517 P.2d 507 (1973), this statement merely amounted to an assertion that the State's evidence was uncontroverted. It is well settled that such assertions are permissible...

The prosecutor's statement about reasonable alternative explanations for the events of January 10, 1975 is likewise unobjectionable under *Acosta*. The context of the statement shows that the prosecutor was merely asking the jury to see whether defense counsel could provide an explanation in his closing argument. The statement was clearly not calculated to draw the jury's attention to appellant's failure to testify.

4. "Where Were the Defense Witnesses?"

State v. Petzoldt, 172 Ariz. 272, 836 P.2d 982 (App. Div. 2 1991).

PROSECUTOR

Prosecution stated during rebuttal that although the defense does not have the burden to produce evidence, if the defense counsel had something that he thought was important to consider, he has subpoena power.

COURT

The prosecutor was referring to people who could have been subpoenaed, that is, people other than Petzoldt [defendant]. The comments do not draw attention to Petzoldt's silence.

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

DEFENSE

The defendant argued that the state failed to prove its case by failing to subpoena certain witnesses.

PROSECUTOR

> If there are people here that I did not subpoena, you can assume that, for whatever reasons, I felt that I did not need their testimony. If Mr. Jackson failed to subpoena those same people--and he's a competent attorney--you can certainly be sure that he did not subpoena those people for the same reason: because they have absolutely no light to shed upon this case.
>
> Any evidence which existed in this case was certainly subject to a subpoena and, in fact, I think its been very obvious to you during the proceedings that Mr. Jackson has had complete access to anything that was in our files. If he had wanted to have it marked, wanted to have it introduced in evidence, he could have done so.
>
> He chose not to do so, and being a competent attorney, you can assume that he didn't do that either because it would have damaged his client or at least that it would not have helped his case to any extent.

COURT

This argument was not a proper comment on defense's failure to call witnesses nor was it invited error by the defense counsel, thus it was error. However, the error was harmless considering the overwhelming evidence against the defendant.

State v. Cozad, 113 Ariz. 437, 556 P.2d 312 (1976).

FACTS

Defendant's contention on appeal was that the prosecutor improperly alluded to the failure of a witness to testify. The witness was purportedly a baby-sitter for codefendant's children on the night of the alleged robbery and was to provide an alibi for defendant. On direct examination defendant testified concerning the use of the baby-sitter.

CROSS EXAMINATION BY PROSECUTOR

> Q. 'You went to--is the babysitter here today?'
>
> A. 'She was.'
>
> Q. 'Is she going to testify?'

A. 'I don't know.'

COURT

The comment to Rule 15.4(c) states in part: 'The rule is not intended to prevent a party from commenting on his opponent's failure to produce a material witness within his control.' There was no error in the comment or the ruling of the trial court in denying a mistrial.

State v. Condry, 114 Ariz. 499, 562 P.2d 379 (1977).

PROSECUTOR

Now there were some other witnesses, ladies and gentlemen, that we never heard from. Where is Mr. James Campbell? Where is Mr. Campbell, the attorney who drafted this will, to tell us what was supposed to be–

[DEFENSE COUNSEL]: 'Your Honor, may I interpose an objection to counsel commenting on evidence not before the jury?'

THE COURT: 'I think it's a reasonable argument, [defense counsel], to suggest inference from the absence of witnesses.'

[DEFENSE COUNSEL]: 'All right, Your Honor.'

COURT

The record does not support the assertion defense counsel makes in his brief that Campbell was not called to testify because he was residing and practicing law in California. Nor has the defendant shown that the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, A.R.S. § 13-1861 et seq., have no application. Without such being established, it was proper for the State to comment on the failure of the defendant to call an important witness who could have substantiated his claim, if true, that the will offered for probate had been drafted for the decedent at her request.

State v. Flynn, 109 Ariz. 545, 514 P.2d 466 (1973).

PROSECUTOR

The prosecutor argued that the defendant did not bring in witnesses to rebut some of the state's evidence. The prosecutor did not specify that the defendant personally had to rebut the evidence.

COURT

The argument was merely an attempt "...to bring home the point that the evidence was uncontroverted and justified a verdict of guilty."

State v. Hatten, 106 Ariz. 239, 474 P.2d 830 (1970).

PROSECUTOR

The prosecutor commented upon the defendant's failure to call as witnesses the persons he claimed he was drinking with and could have substantiated the defendant's version of the facts.

CROSS-EXAMINATION

On cross-examination the prosecutor asked the defendant if he had subpoenaed his friends to testify for him. The defendant answered that he had not. If there were unusual circumstances which prevented the defendant or his counsel from obtaining these witnesses, this could have been brought out on redirect examination by the defendant's attorney.

COURT

It is the rule that the prosecutor may comment upon the failure of the defendant to produce material witnesses who would substantiate his story. [citations] Such rule derives from the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it.

5. "If There Was Evidence, Why Didn't the Defendant Produce It?"

State v. Herrera, 203 Ariz. 131, 51 P.3d 353 (App. Div. 2 2002).

FACTS

During closing argument, Herrera's attorney argued that Officer Bender's description of Herrera's performance on the field sobriety tests was unreliable and subjective. In doing so, counsel specifically mentioned a videotape of Herrera's field sobriety tests that had not been introduced into evidence but presumably would have given the jury an objective view of the tests. Ultimately, counsel stated, '[W]hen you consider the evidence that you have been given, *when you consider the evidence that you haven't been given,* when you apply the nature of the investigation that went on ... you find that Mr. Herrera was not guilty of driving under the influence that night.'

PROSECUTOR

Had the video shown anything other than what Officer Bender testified to, [Herrera] would have showed you that video.

COURT

Contrary to Herrera's suggestion, the prosecutor's remark did not amount to burden shifting. The comment merely prevented Herrera from drawing a positive inference from evidence that he could have presented but did not.

State v. Galbraith, 114 Ariz. 174, 559 P.2d 1089 (1977).

PROSECUTOR

Defense counsel stated quite correctly he did not have to produce any evidence. That is very true. The burden is upon the State to prove beyond a reasonable doubt that that man committed the crime of which he is charged. Think of this. if there is evidence, why wasn't any produced?

COURT

Even assuming that the comments by the prosecutor were directed to a failure on the part of the defense to come forward with evidence,' we find the statements were not a comment on the defendant's failure to testify. The prosecutor's remarks were merely general comments on the fact that the evidence was uncontradicted. We cannot say that because of this one isolated instance that the prosecutor's remarks were calculated to focus the jury's attention on the defendant's failure to testify.

State v. Hinkle, 26 Ariz.App. 561, 550 P.2d 115 (App. Div. 2 1976).

PROSECUTOR

Defense counsel is absolutely right. He doesn't have to present one witness who can come in here and say, 'I saw -- I saw the defendant with Leslie Amos and they were sitting down having a cup of coffee.' He doesn't have to do it. But I submit to you if he had a witness to say it, they would have been here.

COURT

The comment in the case at bar refers to the defendant's failure to produce witnesses rather than his failure to take the stand.

6. The Insanity Defense

State v. Kerstetter, 110 Ariz. 539, 521 P.2d 626 (1974).

PROSECUTOR

There are only two people who know what happened on October 15, 1972 at the time this woman died. One of them is dead. But the statement which is in evidence, that the defendant made to the police. . .

The only evidence we have from anyone regarding what exactly happened between these two is from the defendant as he gave it to his psychologist and his psychiatrist.

COURT

Noting that the defendant's only defense was insanity the court stated that "[e]ven a flat statement as to defendant's failure to take the stand, cannot in this context be considered prejudicial."

7. Fingerprints

State v. Lee, 114 Ariz. 101, 559 P.2d 657 (1976).

PROSECUTOR

> One other thing that I should point out along that line. The only evidence that has been presented by the state. Has there been evidence presented by the defendant? Anything about fingerprints? About Mr. Garcia being wrong? Has there been any evidence presented by ballistics? Mr. Haag when he testified? Has there been any evidence at all presented by Mr. Haag that was wrong? The only evidence presented on the fingerprints are insinuations, conjecture, again holding a red herring here to try to distract your attention from the evidence that is before you.

(Emphasis added.)

COURT

> Although the quoted statement referred directly to the defendant, we are satisfied that it was made within permissible bounds. Because it focused on the state of evidence before the jury it was not an improper reference to appellant's failure to testify. Similar comments by the prosecutor have been held proper.

E. The Use of Excessive and Emotional Language

In the closing argument, excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal, limited by the principle that attorneys are not permitted to introduce or comment upon evidence which has not previously been offered and placed before the jury.

State v. Gonzales, 105 Ariz. 434, 436, 466 P.2d 388, 391 (1970). (The above language has been quoted many, many times in subsequent decisions. E.g., *State v. Jones*, 197 Ariz. 290, 305, 4 P.3d 345, 360 (2000)).

Again, wide latitude is afforded the prosecutor in presenting his closing argument. Following are cases which illustrate some, but obviously not all, of the possible arguments. The actual quotes follow in the order presented below.

1 Don't Condone What the Defendant Did

State v. White, 11 Ariz.App. 465, 465 P.2d 602 (App. Div. 2 1970).

2. "You Better Have a Reason" For a Not Guilty Verdict

State v. Grilalva, 137 Ariz. 10, 667 P.2d 1336 (App. Div. 2 1983).
State v. Garrison, 120 Ariz. 255, 585 P.2d 563 (1978).

3 Calling the Defendant Names

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004). *State v. Kreps*, 146 Ariz. 446, 706 P.2d 1213 (1985). *State v. Buchholz*, 139 Ariz. 303, 678 P.2d 488 (App. Div. 2 1983).

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989).

State v. Tucker, 26 Ariz.App. 376, 548 P.2d 1188 (App. Div. 2 1976).

State v. Boag, 104 Ariz. 362, 453 P.2d 508 (1969).

4. Discussing Defense Attorney's Assertion That He Did Not Speak to His Witnesses

State v. Gregory, 108 Ariz. 445, 501 P.2d 387 (1972).

5. The Defendant Has Family and Friends Here; The Victim Has No One.

State v. Beers, 8 Ariz.App. 534, 448 P.2d 104 (App. 1968).

6. There is Difficulty in Getting Witnesses to Testify Against Dangerous Defendants.

State v. Smith, 114 Ariz. 415, 516 P.2d 739 (1977).

7. The Use of Gruesome Photographs

State v. Freeman, 114 Ariz. 32, 559 P.2d 152 (1977).

8. Mentioning Victim's Suffering

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).
State v. Griffin, 117 Ariz. 54, 570 P.2d 1067 (1977).

9. Discussing the Crime Problem in the Community

State v. Walker, 181 Ariz. 475, 891 P.2d 942 (App. Div. 1 1995).

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983).

State v. Moore, 112 Ariz. 271, 540 P.2d 1252 (1975).

State v. Jaramillo, 110 Ariz. 481, 520 P.2d 1105 (1974).

State v. Bennett, 111 Ariz. 391, 531 P.2d 148 (1975).

10. Discussing the Unfairness to the Rape Victim

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).
State v. Morales, 110 Ariz. 512, 520 P.2d 1136 (1974).

11. The Victims Are The Prosecutor's Clients; The Defenses Are Phoney.

State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977).

12. Comments On The Defense Counsel's Approach To The Case

State v. Long, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986).

State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983) cert. denied, 103 S.Ct. 3097.

State v. Rainey, 137 Ariz. 523, 672 P.2d 188 (1983).

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

13. Testimony or Demeanor of the Defendant

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770 (App. Div. 2 2009).

State v. Tuell, 112 Ariz. 340, 541 P.2d 1142 (1975).

State v. Smith, 122 Ariz. 50, 592 P.2d 1316 (App. Div. 2 1979).

State v. Newman, 122 Ariz. 433, 595 P.2d 665 (1979), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973).

State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956).

14. Comments on the Importance of the Case *State v. Blackman*, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

SUMMARIES

1. Don't Condone What Defendant Did

State v. White, 11 Ariz.App. 465, P.2d 602 (App. Div. 2 1970).

PROSECUTOR

> If you find that Bobby Dean White is innocent of any of these counts, you are condoning what he did and you are saying, well, maybe he didn't know that the account was closed. So it was all right for him to go out and write those checks. That's all right now.

COURT

Wide latitude is allowed counsel in arguments to a jury. The above statement is merely an attempt to persuade the jury to convict and we believe it permissible.

2. "You Better Have a Reason" For Not Guilty Verdict

State v. Grilalva, 137 Ariz. 10, 667 P.2d 1336 (App. Div. 2 1983).

PROSECUTOR

> I just raised this question, [sic] do we have to wait until this man finds a victim who will open his door, open that door to him. Do we have to wait until someone is raped to deal with this man.

DEFENSE

The argument was "improper and intended to inflame the passions and fears of the jury."

COURT

> . . . [W]hen considered with the facts of this case, the deflated tires, the conversation at the door, the scattering of the victim's underclothes and the Vaseline, there is an arguable inference that this was a burglar who planned his crime and therefore might do so again. (citations omitted) Even more important is the fact that this was a charge of attempt and the fact that nothing really happened had been brought home to the jury from the beginning. This argument is proper to counteract that impressions. Assuming *arguendo* that the argument was improper, the trial judge implicitly found that under the circumstances of the case the jury was probably not influenced by the remarks.

State v. Garrison, 120 Ariz. 255, 585 P.2d 563 (1978).

PROSECUTOR

> Like I said before, if you are going to come back with a verdict of not guilty, ladies and gentlemen, you better have a reason, or you better have a reasonable explanation for all this evidence that's against the Defendant. You're turning this man loose and he will walk out the door, ladies and gentlemen, and as I said before, the evidence suggests in this case a total lack of regard for human life, such a lack of regard, ladies and gentlemen, if you don't expect such a crime could happen, or that a crime could happen, or that a criminal necessarily, in committing such a crime as this, necessarily is going to stop at just this one death, you better think about that before you come in this courtroom and say not guilty. You think about that evidence I have presented to you, it's an important matter, and Mr. Murray tries to say no, it's not important anymore, her life is over, but it's very important for the rest of the lives of this community. Very important.

COURT

> We do not think it was unreasonable for the prosecution to tell the jury as it did in the first sentence of the quoted argument that if it was going to come back with a verdict of not guilty, it had better have a reasonable explanation for all the evidence against the defendant.
>
> The most that can be said about the prosecution's argument in the instant case is that the prosecution is telling the jury that the evidence shows a total lack of regard for human life and that a criminal who commits such a crime is not necessarily going to stop at one death. In the light of the total circumstances of how this homicide was committed, the argument that the criminal who committed it is not necessarily going to stop, while an emotional appeal, is one which is a permissible inference to be drawn from the nature of the evidence and did not unfairly prejudice appellant.

3. Calling the Defendant Names

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).

PROSECUTOR

The prosecutor, in discussing the defense's claim that people did not understand dissociative identity disorder, referred to the defendant as "poor Robert Moody" for being afflicted with a disorder that no one understands.

COURT

> ... Prosecutors "may comment on the vicious and inhuman nature of the defendant's acts," but "may not make arguments which appeal to the passions and fears of the jury." Although we agree that belittling a criminal defendant in closing argument is improper and unnecessary, given the evidence in this case we do not find that the passing comment constituted fundamental error. We therefore conclude that referring to the defendant as "poor Robert Moody" was not an error "of such dimensions that it cannot be said it is possible for a defendant to have had a fair trial.

(Internal citations omitted.)

State v. Kreps, 146 Ariz. 446, 706 P.2d 1213 (1985).

PROSECUTOR

> Sure, he's never been arrested before but is he such a good guy? He didn't work for two and a half years. Sure, it's a tough time, but he lived off that girl for most of the time, he wasn't working, he was a lazy person that sat around the apartment all the time feeling sorry for himself.

COURT

The argument was a fair comment on the evidence and defense counsel waived all but fundamental error by failing to object.

State v. Buchholz, 139 Ariz. 303, 678 P.2d 488 (App. Div. 2 1983).

Comments by the prosecutor which defendant claimed mislabeled him as a "fence" were within allowed limits where defendant had been charged with making five purchased of stolen property over an eight month period, but not with trafficking in stolen goods.

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

DEFENSE

The defendant "was not so stupid as to commit the offense with which he was charged."

PROSECUTOR

> After a prosecutor has tried a few cases--and I'm not suggesting that I'm the most experienced prosecutor in the world--but after you'd tried a few cases, you tend to almost cringe when you hear defense attorneys making the same argument over and over again. I'm sure that every time they make it they think it's an original argument. I'm almost getting sick of hearing defense attorneys stand up and say how could my client be so stupid as to do what he's charged with doing.

COURT

> This comment by the prosecutor does not constitute a comment either directly or inferentially on appellant's right to remain silent. We also note that the comment was invited by defense counsel's closing argument. We find no error.

(Internal citations omitted.)

State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983), *abrogated on other grounds by State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989).

The prosecutor did not err in referring to the defendant as a "murderer" as "such a description could be reasonably drawn from the evidence presented at trial."

State v. Tucker, 26 Ariz.App. 376, 548 P.2d 1188 (App. Div. 2 1976).

PROSECUTOR

> [T]he facts show her to be a liar, a hypocrite, a forger, a woman who would take food from hungry children ... There is only one verdict that is obvious here. That is guilty, guilty, guilty--fourteen times.

COURT

Trial court did not abuse discretion in denying new trial.

State v. Boag, 104 Ariz. 362, 453 P.2d 508 (1969).

PROSECUTOR

> What kind of person would do something like that? I couldn't even call him an animal, because animals wouldn't do this type of thing.

COURT

> The vicious nature of the acts could be properly emphasized by counsel within the latitude given to him in closing argument.

4 Discussing Defense Attorney's Assertion That He Did Not Speak To His Witnesses

State v. Gregory, 108 Ariz. 445, 448, 501 P.2d 387 (1972).

DEFENSE

> Now, we come to the witnesses that the Defendant presented. And mind you, ladies and gentlemen of the Jury, I didn't talk to these witnesses, the County Attorney did, because I gave him the names of these witnesses that were going to testify. And his investigator talked to them. I didn't know what they were going to say. I didn't know that Mrs. Whobrey had this--this calendar....

PROSECUTOR

> And pay particular attention to something Counsel said to you in his argument, and remember this, that he didn't know what the witnesses were going to say. He's defending this man on serious charges, but he put these people up without talking to them. Ask yourself a question. A man defending another man, bring on witnesses--

(At this point the defense counsel objected and moved for a mistrial and the attorney for the State went on.)

> Just remember the logic of that. Defending a man and not bothering to talk to the witnesses

before he puts them on? The State submits don't buy it.

COURT

We do not believe that the remarks of the prosecuting attorney were as inflammatory or derogatory as the defendant contends and we find no error.

5. Defendant Has Family And Friends Here; Victim Has No One.

State v. Beers, 8 Ariz.App. 534, 448 P.2d 104 (App. 1968).

PROSECUTOR

Well, Jamie Boyett is not here to tell us what happened in the days and the weeks before this horrible occurrence. As I recall the evidence, he was just beginning to speak, and he could say a few words. Well, he never has had an opportunity to speak and never will. And if you recall, during all the evidence in this case, the defendant has had his family and his friends sitting behind him, behind him all the way, interested in the outcome of this matter. Jamie Boyett has no one.

COURT

We feel that the prosecutor's statements are not such as to cause this Court to reverse the lower court for abuse of discretion. These remarks, although they may be borderline examples, do fall within the wide latitude approved by the Arizona Supreme Court.

(Emphasis added.)

6. Difficulty In Getting Witnesses To Testify Against Dangerous Defendant

State v. Smith, 114 Ariz. 415, 516 P.2d 739 (1977).

PROSECUTOR

If you want to deter people or stop people like Sharon Roach from coming in and testifying to a crime that would really never have been prosecuted because everyone is so afraid, and totally so, of testifying against a defendant like this, then you acquit this defendant of this crime.

COURT

The comment was obviously an emotional appeal to the jury to do its duty. The State drew the jury's attention to the difficulty of getting witnesses to testify against dangerous defendants and then tried to impress upon it the consequences of its failure to carry out its duty. We find

nothing which disturbs us in the arguments.

7. Gruesome Photographs

State v. Freeman, 114 Ariz. 32, 559 P.2d 152 (1977).

FACTS

The defendant was convicted of murdering seven members of the Bentley family. The defendant pled both not guilty and not guilty by reason of insanity.

PROSECUTOR

And Debra; he wants Debra to call him Uncle John. That's just great. Excellent. Uncle John, huh? Here's what old Uncle John did. (displaying photograph) You don't see much of this in T.V., do you?

Good old Uncle John.

Uncle John.
Uncle John.
Uncle John!

The reason why Novella wasn't talking to her neighbor, Mrs. Gossage (displaying photograph). There is Pam (displaying photograph), Adam (displaying photograph). Uncle John. This is Charlotte (displaying photograph).

COURT

The photographs used by the county attorney, as the defendant himself concedes, had been properly admitted into evidence. They were relevant to the State's case and properly subject to consideration by the jury.

8. Victim's Suffering

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).

PROSECUTOR

Prosecutor frankly described the victims' murder. He ended his argument by telling the jury that Moody had no sympathy for the victims and asking them to have no sympathy for him.

COURT

We conclude that such a statement passes muster as an exhortation to the jury to do its duty. Moody therefore fails to demonstrate fundamental error requiring reversal on this issue.

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).

DEFENSE

How would you like to be sitting at the defense table charged with a crime, there's no physical evidence. You've got an eye witness. That's the sum total of the evidence. You can't really cross-examine them. How would you like to be sitting there thinking the police could have put something in a plastic bag and saved it for a couple of months and that could prove your innocence? You can't get at it. What would you be feeling right now?

PROSECUTION

His big complaint in this area is how would you feel if you were Gary Mitchell and you're on trial for a case like this and the enzymes were lost. I would just like to give you the converse of that and say how would you feel if you were Cheryl Morrison and you picked out the man that raped you and you said this is him, there is no doubt in my mind about that, and the jury found the guy not guilty just because the police didn't refrigerate those enzymes? How would that feel? That would be a miscarriage of justice if that were the case, if Cheryl Morrison had to find out this man was found not guilty just because the police had not refrigerated those enzymes.

COURT

The prosecutor's arguments were merely responsive to the defense arguments and did not result in prejudice.

State v. Griffin, 117 Ariz. 54, 570 P.2d 1067 (1977).

PROSECUTOR

You should all be outraged that a man like Mr. Fields should have to suffer something like this, not only to come to court, both the prelim and now a trial.

COURT

Though the hardship of the victim was not strictly relevant to appellant's guilt or innocence, we do not think it is wholly beyond the bounds of fair comment.

9. Crime Problem in the Community

State v. Walker, 181 Ariz. 475, 891 P.2d 942 (App. Div. 1 1995).

PROSECUTOR

You've all heard about the war on drugs, ladies and gentlemen, and you've heard testimony in this Court that Phoenix is a distribution center for some of the drugs that go out throughout this country, often to east-coast cities, certainly due to the proximity that we are to the border.

And every one of you who's ever heard about the war on drugs and wanted to do anything about the war on drugs, this is your opportunity to see what is going on in the front battle lines because, ladies and gentlemen, this case involves a substantial amount of marijuana. You've all seen it. It's in these boxes and you'll have an opportunity probably to look at it later.

COURT

The remarks at issue in this case were not inflammatory. Although the prosecutor suggested at one point that the jurors may have "wanted to do something about the war on drugs," she avoided any rhetorical attempt to enlist them in that cause. Rather, the prosecutor followed that remark by stating that the jurors had an opportunity to "see what is going on in the front battle lines" by viewing the marijuana seized and introduced at trial. Such an argument, linked to evidence presented at trial, was not improper because it did not urge the jury to convict defendant "'for reasons wholly irrelevant to his own guilt or innocence.'"

State v. Smith, 136 Ariz. 273, 665 P.2d 995 (1983).

PROSECUTOR

> There were over 125 people killed in our community last year. All of these deaths were very tragic, but none more senseless than this killing. In the United States alone last year, one person was killed every 20 minutes, 72 lives taken every day. And again last year, Phoenix was among the top ten in the most violent cities in America.

COURT

The statements were improper in that they refer to facts not in evidence. However, as defense counsel did not object and the error was not fundamental, the error was waived.

State v. Moore, 112 Ariz. 271, 540 P.2d 1252 (1975).

PROSECUTOR

> We have all heard about the rising crime rate throughout the country. We have heard about the rise in violence. We have heard about it. We are sick of it.

COURT

No error.

State v. Jaramillo, 110 Ariz. 481, 520 P.2d 1105 (1974).

PROSECUTOR

> There is one final thing I am going to say, and that is this: You are probably keenly aware of the drug problem in our community. Perhaps as Citizen Kane, you have wondered what can you do about the drug problem. What can be done?
>
> The State's opinion is this: You will never in any of your lifetime have a better opportunity to do something about the drug problem, particularly about heroin sellers, than you've got here today in court ... You've got the evidence of two police officers and a federal chemist to tie this defendant in air tight.

The prosecutor concluded his argument stating:

> The State urges you to return the only verdict supported by the evidence, and that is the verdict of guilty of the sale of heroin.

COURT

Reference to prevalence of crime is not improper.

State v. Bennett, 111 Ariz. 391, 531 P.2d 148 (1975).

PROSECUTOR

> Robbery is robbery, and you don't have to go into the jury room blinded. You heard what the statistics [sic] are. It's a serious offense, crime . . . .

COURT

Reference to the prevalence of crime is not improper.

10. Unfairness To Rape Victim

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).

DEFENSE

> How would you like to be sitting at the defense table charged with a crime, there's no physical evidence. You've got an eye witness. That's the sum total of the evidence. You can't really cross-examine them. How would you like to be sitting there thinking the police could have put something in a plastic bag and saved it for a couple of months and that could prove your innocence? You can't get at it. What would you be feeling right now?

PROSECUTION

> His big complaint in this area is how would you feel if you were Gary Mitchell and you're on trial for a case like this and the enzymes were lost. I would just like to give you the converse of that and say how would you feel if you were Cheryl Morrison and you picked out the man that raped you and you said this is him, there is no doubt in my mind about that, and the jury found the guy not guilty just because the police didn't refrigerate those enzymes? How would that feel? That would be a miscarriage of justice if that were the case, if Cheryl Morrison had to find out this man was found not guilty just because the police had not refrigerated those enzymes.

COURT

The prosecutor's arguments were merely responsive to the defense arguments and did not result in prejudice.

State v. Morales, 110 Ariz. 512, 520 P.2d 1136 (1974).

PROSECUTOR

> There's a great lesson--there's a great lesson for all womankind to be learned from the cross-examination of Letty Huerta as to the following argument of Mr. Johnson as to what happens to a rape victim with respect to the questions that she is likely to be asked. Alot of women have learned this lesson and that is why we don't get too many of them in court. Ladies of the world, if you are going to be raped, take notes because that is the only way that you are going to be able to withstand cross-examination. Which hand did he use to unzip his pants? How far down were your drawers?
>
> Those are the kind of questions that you are going to be asked, anyone in a rape case.

COURT

> Prosecution, by this remark, was merely attempting to demonstrate the unfairness in requiring a raped woman to remember the minutiae of an event which by its nature is attended by fear of life or great bodily harm. The objective of the prosecution was to convince the jurors that the prosecutrix was relating the truth about the occurrence even though she was unable to recall specific isolated details. The remark of the prosecution was proper and not prejudicial."

11. The Victims are the Prosecutor's Clients; Defenses Are Phoney

State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977).

PROSECUTOR

> The State's remarks were: (1) the prosecutor's statement that he had three clients in this case, i.e., the three victims; (2) one of the victims 'took his last breath lying there in his own beer cans'; (3) the repeated references to the defense as being 'phony'; (4) the statement that one of the victims, a jockey by profession, had 'ridden his last horse', that 'winning the big race is no longer a dream', that 'Living is no longer a reality because he is dead'; (5) the admonition to the jury not to take out on the victims the fact that the accomplice had been granted immunity, that they should take it out on him [the prosecutor] later.

COURT

> From our examination of the record, we have concluded that the prosecutor's remarks were well within the permissive range of argument. Although the summation had emotional overtones, it did not call to the jurors' attention matters which they were not permitted to consider in the determination of their verdict.

12. Comments on the Defense Counsel's Approach to the Case

State v. Long, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986).

In this case, the defense attorney refused to call a certain witness and defendant asked to represent himself and call the witness. The defendant stated that defense attorney refused to call the witness because of his belief the witness would perjure herself. The prosecutor stated in closing argument that defense counsel's behavior was an indication of the credibility of the witness. The court found this to be prejudicial error.

> "We find this effort to make affirmative evidence of guilt out of defense counsel's ethical behavior to be prejudicial error. The conviction [is] reversed. . . ."

State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983) cert. denied, 103 S.Ct. 3097.

PROSECUTOR

> Now, the defense attorney told you that the victim did not deserve to die, and referred to it as a tragic occurrence, but it was more than that. It was a brutal and senseless killing in which the defendant smashed in the head of a 78-year old lady and left her to bleed to death, as the doctor told you, in the alley. That's first degree murder from an emotional point of view and a logical point of view.

COURT

The prosecutor's closing argument, although emotional, was nothing more than a statement of the circumstances of the killing and did not focus the attention of the jury on matters not properly before them. Defendant's counsel failed to timely object and thus was foreclosed from raising this issue on appeal.

State v. Rainey, 137 Ariz. 523, 672 P.2d 188 (1983).

PROSECUTOR

> You won't hear any jury instruction saying the State has to prove the Defendant used that item during a race. Do you know what this is? This is deceiving ... Mr. Minker tells you about the investigation he did on the case. Remember I showed him all these photographs.
>
> Are there any photographs in there that accurately showed you the are of the jockey room or the door of the jockey room or the actual width of the hedge? All those photographs are deceiving ...

[The prosecutor also labeled another of appellant's arguments as a "little deceiving" and asked the jury to listen to the definition of the offense that was going to be given by the court and to "consider the word deceiving in this case.]

DEFENSE claimed this was an unwarranted personal attack on defense counsel.

COURT

> [I]n the closing argument excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal. . . . We do not believe that the remarks of the prosecuting attorney were as inflammatory or derogatory as the defendant contends and we find no error.

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

PROSECUTOR

> Why do you suppose Mr. Jackson feels that the only way he can defend this client is to strike out at everybody involved in this case? To talk about the, I believe it was the crude O'Leary and Tapper? to engage in this smear campaign with Dixie Williams? I won't even mention the smear campaign with the people who weren't ever here.

COURT

> This argument was clearly in response to appellant's closing argument. Appellant's counsel had characterized O'Leary and Tapper as crude, and implied that Dixie Williams, appellant's successor in office was motivated by her desire to take over appellant's job. The prosecutor's argument in this regard was therefore invited by appellant's argument.

13. Testimony or Demeanor of the Defendant

A prosecutor may, of course, comment upon the testimony and demeanor of the defendant when the defendant takes the witness stand. The prosecutor should not comment upon the demeanor of the defendant if the defendant does not testify, unless the defense has opened the door.

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770 (App. Div. 2 2009).

FACTS

During Edmisten's closing argument, defense counsel discussed the differences between Edmisten's behavior while committing the various offenses charged with his demeanor in the courtroom.

PROSECUTOR

> Now, I'm not sure what counsel is asking you to do, but, in terms of when he talks to you about you have seen Mr. Edmisten sitting here this last week and you noticed his demeanor and, gee, does that look like the demeanor of somebody who would do all of these violent crimes, well, ladies and gentlemen, we certainly expect defendants, when they come into this courtroom, to sit here and be somewhat polite and not start shooting people. If that was the case, we would have a problem. We would expect this defendant to sit here before the jury and act polite and act just like he has been the last few days. His demeanor in court has nothing to do with whether or not he committed these crimes on December 22nd of 2005.

COURT

> The prosecutor's comments about Edmisten's in-court demeanor responded directly to a point defense counsel had raised and fell well within the latitude afforded attorneys during closing

argument. Even if the prosecutor's comment could be considered improper or irrelevant, Edmisten's counsel opened the door to such argument, and the prosecutor was entitled to respond.

[citations omitted].

State v. Tuell, 112 Ariz. 340, 541 P.2d 1142 (1975).

PROSECUTOR

If you can recall the testimony about the photograph, he said he turned it over and looked for tattoos or indication of tattoos. And there were none on the back of that photograph. No indication that this defendant had tattoos. He was concerned about that.

You recall at that time I called the jail to find out if this defendant had any tattoos. That was his testimony.

You've had occasion to see the defendant the last two days. He's been sitting here. He obviously has a long-sleeved shirt on. He had a long-sleeved shirt on yesterday.

At this time, Your Honor, ladies and gentlemen of the jury, I simply ask you to consider and think about why Mr. Tuell is wearing a long-sleeved shirt today. He wore a long-sleeved shirt yesterday.

COURT

Appellant urges the prosecutor's closing argument was improper and prejudicial. It is argued that statements by the prosecutor referring to the fact that appellant wore long-sleeved shirts during the trial indicated that the appellant was a drug addict and wore the long sleeves to hide his needle tracks.

It is clear there was no inference either that the appellant was a narcotics user or that there were track marks on his arms. The comments obviously referred to shirt sleeves covering tattoos on appellant's arms. The prosecutor's argument was not improper, and the trial court did not err in refusing to grant a mistrial.

State v. Smith, 122 Ariz. 50, 592 P.2d 1316 (App. 1979).

PROSECUTOR

[Y]ou had a chance to view the witnesses today and in this case, it's very important. Which one of the witnesses, the State's witnesses or the defendant, Mr. Smith, had the violent temper? Which one had the outburst in Court?

COURT

Proper when defendant testifies.

State v. Newman, 122 Ariz. 433, 595 P.2d 665 (1979).

PROSECUTOR

> The defendant has been silent because again the defendant is presumed innocent until proven guilty.

And:

> He [the defendant) hasn't worn them [his eye glasses] for the last few days and you will notice he kept his mouth shut for the majority of the case.

COURT

> The prosecutor's remark that defendant 'kept his mouth shut' referred to defendant's shutting his mouth to cover his gold tooth.

Held:

> A prosecutor is entitled to draw attention to the failure of the defendant to present evidence when he testifies. [cites omitted] The defendant did testify in the instant case so there was no comment upon his failure to testify.

State v. Shing, 109 Ariz. 361, 509 P.2d 698 (1973), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

PROSECUTOR

> The prosecutor argued that the defendant had made his account of the facts fit with testimony given by the other witnesses.

COURT

Not improper (and no objection).

State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956).

PROSECUTOR

> He hasn't in this entire case from the history of it up until today shown the slightest bit of remorse or worry or concern about what he has done.

COURT

Statement did not constitute comment on failure of the defendant to testify (may be prejudicial in some cases).

14. Comments on the Importance of the Case

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

PROSECUTOR

> I've never tried a more important case in my life. I have never been involved in a more important case in my life. I have never been privileged to have the opportunity to affect the very fabric of our society as I am in this case right now. And the truth is is [sic] that each and every one of you has that same privilege available to you.....
>
> Ladies and gentlemen, what you do in the next two or three, four days, is going to affect more lives and more people, and affect the very fabric of our society more than anything you will do for the rest of your lives. I can almost assure you of that.

COURT

> They might, however, be viewed as obliquely placing the prestige of the government behind the case. Nonetheless, we conclude that these unnecessary and irrelevant comments did not deny Defendant a fair trial. The jury was able to assess the importance of the case for itself, and the trial judge, who was in the best position to do so, determined that the statements did not require a new trial. We find no abuse of discretion in that determination.

(Citations omitted.)

F. Comments on the Credibility of the Defense

Comments on the credibility of the defense or of the defense witnesses are allowed under the "wide latitude" afforded in closing argument. These comments fall into several categories:

1. The Defendant has Everything to Gain and Nothing to Lose by Testifying Falsely.

State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).

State v. Young, 109 Ariz. 221, 508 P.2d 51 (1973).
State v. Williams, 113 Ariz. 442, 556 P.2d 317 (1976).

2. Comments About Prior Convictions

State v. Bolton, 1 82 Ariz. 290, 896 P.2d 830 (1995).
State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).
State v. McNair, 141 Ariz. 475, 687 P.2d 1230 (1984).
State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983).
State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978).
State v. Coury, 4 Ariz.App. 239, 420 P.2d 582 (1966).
State v. Chance, 92 Ariz. 351, 377 P.2d 197 (1962).

State v. Brooks, 107 Ariz. 320, 487 P.2d 387 (1971).
State v. Hannon, 104 Ariz. 273, 451 P.2d 602 (1969).

3. Comments Upon the Credibility of Defendant's Testimony

State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).

State v. Lucas, 146 Ariz. 597, 708 P.2d 81 (1985), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 927 P.2d 762 (1996).

4. Comment on Defenses Which Were not Disclosed Earlier

State v. Jones, 109 Ariz. 378, 509 P.2d 1025 (1973).

State v. Trotter, 110 Ariz. 61, 514 P.2d 1249 (1973).

State v. Raffaele, 113 Ariz. 259, 550 P.2d 1060 (1976).

State v. Calhoun, 115 Ariz. 563, 563 P.2d 888 (1977).

5. Comments Upon the Credibility of the Prosecution Witnesses

State v. Islas, 119 Ariz. 559, 582 P.2d 649 (App. 1978).

State v. Holsinger, 115 Ariz. 89, 563 P.2d 888 (1977).

SUMMARIES

1 Defendant Has Everything to Gain and Nothing to Lose by Testifying Falsely

State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).

PROSECUTOR

Mr. McDonald is a two-time convicted felon. He has been convicted of two felonies in

the past. The Judge is going to instruct you that it is proper that you are not to consider that as to whether or not that reflects on him as a good person or a bad person. You are merely to consider that to help you weigh his credibility, weigh and balance.

Do you want to believe a person, two-time convicted felon, who has everything to gain by lying and nothing to lose?

COURT

The prosecutor's argument emphasized the limited purpose for which the jury could consider the prior convictions. We also note that there was no objection to any of the tree above-quoted arguments.

State v. Young, 109 Ariz. 221, 223, 508 P.2d 51 (1973).

PROSECUTOR

The only testimony of that is coming from the person who killed him, the person who has everything to lose and nothing to gain by testifying falsely.

Consider all of his testimony, the number of times he has admitted fabricating a story.

Secondly, even if you assume that he wasn't fabricating these stories about Mr. Patterson, what gives him the right to kill somebody who might not be the upstanding citizens that we are?

COURT

Wide latitude is also permitted in presenting closing arguments to the jury. Under Arizona law, attorneys are permitted to comment on the evidence already produced and to argue reasonable inferences from that evidence.

State v. Williams, 113 Ariz. 442, 556 P.2d 317 (1976).

PROSECUTOR

I mean you don't have to listen to Willie and say 'well, Willie said he didn't do it, therefore he didn't do it.' You can disregard it, because his testimony is so weighted and prejudiced in favor of himself, because he has such a big interest in the case, that it really isn't the type of testimony that should be considered in the case.

But from the evidence before you, from all the facts, a physical description, that's all you have in this case, I think the evidence shows that Willie Leon Williams is guilty beyond a reasonable doubt.

COURT

Counsel may comment on the credibility of a witness where his remarks are based on the facts in evidence.

2. Comments About Priors

State v. Bolton, 182 Ariz. 290, 896 P.2d 830 (1995).

PROSECUTOR

The prosecutor described how the police had gone about identifying suspects and said that police "knew Daren Bolton was a kid who frequently hung out in this neighborhood, and, in fact, he had a sex-related conviction from the location of Speedway and Country Club, not far from where [the victim] was kidnapped."

COURT

> The trial court did not abuse its discretion in denying the motion for mistrial. We do not believe it reasonably likely that the prosecutor's reference to defendant's prior conviction had any effect on the jury's verdict. By the time of closing arguments, evidence of defendant's prior conviction for kidnapping and sexual abuse had been admitted, which alone distinguishes this case from all the cases that defendant cites in his opening brief. . . . The trial court here instructed the jury on the proper use of defendant's prior convictions immediately before argument began, and the prosecutor reinforced the instruction during her argument. We do not believe the prosecutor's reference to defendant's prior conviction affected the outcome of the trial.

State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).

PROSECUTOR

> Mr. McDonald would have you believe that although he's terrorized in here, not only is he terroized by the thought that there's robbers running around in here with weapons terrorizing people again, he's terrorized because the police are going to come and he's a two-time convicted felon and he has had problems with the police, and he doesn't want them to suspect that he is the robber because he's cowering over here in the pay phone booth.
>
> Mr. McDonald is a tow-time convicted felon. He has been convicted of two felonies in the past . . . .
>
> Do you want to believe a person, a two-time convicted felon, who has everything to gain by lying and nothing to lose?

COURT

> The first segment of the prosecutor's argument permissibly portrays McDonald's testimony.

State v. McNair, 141 Ariz. 475, 687 P.2d 1230 (1984).

Closing argument which made reference to prior felonies already properly in evidence was not improper.

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983).

PROSECUTOR

> I would also suggest to you that the criminal record of the defendant might tell you something about his predisposition to commit a crime. We're talking about somebody who has three prior felony convictions. This is somebody who obviously has been through the system, is aware of what crime is.

DEFENSE

> Your Honor, I object to this argument. It's contrary to the jury instructions. It's a misstatement of the law.

(Sustained)

COURT

> As a general rule, evidence of crimes other than those for which defendant is being tried is not admissible because of the questionable relevancy of the evidence and prejudice to defendant. . .
>
> As the defendant's prior convictions were not admitted into evidence to show motive, intent, absence of mistake or accident, common scheme or plan or identity, it was improper for the prosecutor to argue to the jury that defendant's prior felony convictions indicated a predisposition to commit the crime. . .
>
> As the prosecutor's remarks were brief, and the trial court instructed the jury that defendant's prior felony convictions could not be considered to prove that he had a propensity to commit crimes, we find it unlikely that the jury was influenced by the prosecutor's remarks. Therefore, we find that the remarks of the prosecutor, while improper, constituted harmless error under the circumstances of this case.

State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978).

PROSECUTOR

The prosecutor repeatedly referred to the felony convictions of various witnesses including the defendant.

COURT

Since the prosecutor's discussion did not call to the jury's attention matters it would not have been justified in considering, it did not constitute grounds for reversal.

State v. Court, 4 Ariz.App. 239, 420 P.2d 582 (1966).

PROSECUTOR

If you believe that he is a convicted felon, you can take that to be used against him as to his credibility and the Judge will so instruct you.

COURT

The record of prior conviction having been properly admitted for purposes of impeachment, the County Attorney's comments were not error.

State v. Chance, 92 Ariz. 351, 377 P.2d 197 (1962).

PROSECUTOR

The prosecutor commented upon the defendant's record and his demeanor on the stand.

COURT

There is nothing improper in discussing the evidence before the jury nor in calling the jury's attention to the defendant's demeanor while he was testifying.

State v. Brooks, 107 Ariz. 320, 487 P.2d 387 (1971).

CROSS-EXAMINATION OF DEFENDANT

Q. 'Have you ever been convicted of a felony, Mr. Brooks?'
A. 'Yes.'
Q. 'Where were you convicted of this felony?'
A. 'Here, by you.'
Q. 'When was that?'
A. 'Last Wednesday.'
Q. 'And what kind of felony was that?'
A. 'Theft.'
Q. 'Theft from a Person?'
A. 'Yes.'"

PROSECUTOR

Now, Mr. Brooks [defendant] tends to flirt a little bit with the truth. He flirted with the truth earlier last week and a jury of twelve also found him guilty. He will flirt

again because he has a real interest in doing so.

COURT

These remarks were obviously in reference to defendant's statement above that he had recently been convicted of a felony. This could only be on a trial which resulted from a plea of not guilty. The remarks were therefore not so inflammatory or offensive as to be prejudicial.

State v. Hannon, 104 Ariz. 273, 451 P.2d 602 (1969).

PROSECUTOR

The prosecutor remarked that the defendant was not a person who could "set an example for anybody", and in rebuttal argument the prosecutor stated "Where he is today is at the State Penitentiary." (Defendant had previously testified on cross-examination as to his incarceration in the State Penitentiary.)

COURT

The record in the present case indicates that testimony of the prior conviction was admitted for impeachment purposes. We do not see where any argument in the present case was based upon facts which were not properly in evidence.

3. Defenses Not Disclosed Earlier

State v. Jones, 109 Ariz. 378, 509 P.2d 1025 (1973).

FACTS

The defendant's first trial ended in a hung jury. At the second trial the defendant presented two alibi witnesses for the first time.

CROSS-EXAMINATION OF AN ALIBI WITNESS

Q. 'Were you in town on February 25 and 28?'(dates of the 1st trial)

A. 'Was I in town?'

Q. 'Yes.'

A. 'Yes.'

Q. 'Did you ever testify before in this proceeding?'

A. 'No.'"

PROSECUTOR

I even asked the other one -- I don't remember which one -- whether or not he did testify at the previous trial. He said no. I asked them where they were, whether they were available and one of them couldn't remember whether he was in town or out of town or not. He talked about going to some fairly close place. And I asked him if he was around. 'Yes, I was around.'

Why do I bring this up? God forbid, ladies and gentlemen, but if you are ever charged with a felony and you came up for trial and were not guilty, wouldn't you bother going out and getting your witnesses? Felony is a serious charge. No, they didn't bother to do that. They're last minute witnesses. They are just puffed up for this case. They trial (sic) in here with no notice whatsoever to the State and then they testify.

If I was in their place I'd be out getting every one of those witnesses undoubtedly because I'd be sure I was not guilty and I would ask Mr. Williams, I would ask Mr. Jordan, and tell them they were coming to the first trial and testify, and then ask them 'You remember we went to this place and that place?'

They never showed up. They were never contacted, they never even knew about it. They were available. Why were they just notified yesterday or the day before? Because they are last minute puffed up witnesses. I feel this is very important.

COURT

Here, the prosecution's line of cross-examination was an attempt to show that the alibi was an afterthought or possibly even a fabrication. The credibility of alibi witnesses was clearly relevant to the issues at trial. The remarks in the prosecutor's closing argument served only to call the attention of the jurors to matters which they were justified in considering in determining their verdict.

State v. Trotter, 110 Ariz. 61, 514 P.2d 1249 (1973).

PROSECUTOR

How do you remember so many months ago this robbery at the 7/11 store took place in October, October 31 of 1971? We have all the months of November, December and all the month of January and most of the month of February or half the month of February gone. Now, if the defendant would have claimed to his attorney who had represented him from the start he was not involved and it was someone else they would have gone out like the police and gone and gotten every single one of these witnesses lined up and then submitted them to our office, submitted them to the police department and said he wasn't involved. But when did he first come up with this? Not until some months later, not until some months later were the witnesses contacted.

COURT

The fact that the defendant did not produce his witnesses for the police is certainly a factor which the jury could weigh in determining the validity of the alibi. A party against whom a witness is produced has a right to show everything which may in the

slightest degree affect his credibility.

State v. Raffaele, 113 Ariz. 259, 550 P.2d 1060 (1976).

PROSECUTOR

But, if he had really just been knocked out by somebody he was chasing for something that had happened to his brother, why didn't he tell the police that? Why wouldn't he say, 'Hey, look, a guy that just committed an assault--'".

COURT

The statements of the prosecutor were permissible comment on the creditability of the accused by comparing his court testimony with his earlier out-of-court statements.

State v. Calhoun, 115 Ariz. 115, 563 P.2d 914 (App. Div. 1 1977).

CROSS-EXAMINATION AND REBUTTAL

The defendant complained of questions put to him to Officer Hill in the state's case on rebuttal. Each of these questions drew a generally negative response, to the effect that appellant had not responded to certain questions or provided certain particular information at the time he was questioned following his arrest.

PROSECUTOR

Commented upon cross-examination.

COURT

The difficulty with appellant's position in regard to these matters is two fold. First, appellant did not remain silent at the time of his arrest. He answered police questions after having been advised of his right to remain silent. He also took the stand and testified at some length on direct examination as to what he told the police.

The defendant attempted to create a defense based upon the police inaction in finding the true culprit. The prosecutor had the absolute right to cross-examine the defendant concerning this alleged police incompetency defense.

4 Comments on the Credibility of Defendant's Testimony

State v. McDonald, 156 Ariz. 260, 751 P.2d 576 (App. Div. 2 1987).

PROSECUTOR

Mr. McDonald would have you believe that although he's terrorized in here, not only is he

terrorized by the thought that there's robbers running around in here with weapons terrorizing people again, he's terrorized because the police are going to come and he's a two-time convicted felon and he has had problems with the police, and he doesn't want them to suspect that he is the robber because he's cowering over here in the pay phone booth.

Mr. McDonald is a tow-time convicted felon. He has been convicted of two felonies in the past . . . .

Do you want to believe a person, a two-time convicted felon, who has everything to gain by lying and nothing to lose?

COURT

The first segment of the prosecutor's argument permissibly portrays McDonald's testimony.

State v. Lucas, 146 Ariz. 597, 708 P.2d 81 (1985), *overruled on other grounds by State v. Ives,* 187 Ariz. 102, 927 P.2d 762 (1996).

The closing argument of the prosecutor characterizing the defendant's testimony as a "snow job" did not draw the attention of the jury to matters not before it nor did it improperly influence the jury. The remarks were in refutation of the defense attorney's attacks on two state witnesses and well within the wide latitude allowed in argument.

5 Comments Upon Credibility of Own Witness

State v. Islas, 119 Ariz. 559, 582 P.2d 649 (App. Div. 2 1978).

PROSECUTOR

In contrasting the credibility of the state's narcotics agent and the defendant's witnesses the prosecutor stated:

What reason would he have to tell any falsehoods about what he saw, what he observed, who said what to him. What motive does he have to lie. What motive does he have to say that it was not Mr. Islas. He has none. 'There are many, many guilty people out there; ladies and gentlemen. This police officer, to be spending his time, going after many numerous people. He's not going to be wasting his time to go after somebody if he didn't feel he was the person that he identified in the first place...

COURT

Court implies that this portion not improper (read the case). *State v. Holsinger,* 115 Ariz. 89, 563 P.2d 888 (1977).

PROSECUTOR

The prosecutor commented upon his main witness:

> Cagnina, I despise the man. I despise everything he stands for. He's a doper. He's a dope pusher. He's a thief. He's a burglar. He's a murderer. I despise him so much that I couldn't even question him in his testimony.

And:

> But you listened to the testimony of Cagnina. And even in Cagnina's lies, even in Cagnina's lies, he convicts that man.
>
> And then Cagnina's story falls apart, because Cagnina sits up there and tells you that they went to the Schornick residence June 1 st, 1975, to burglarize the residence, that he was really an unwilling participant in a burglary, that Wade Arnold was the only one that really wanted to do the job, that he just kind of followed along, followed in the footsteps of Wade Arnold? Is he kidding us? He was there and Wade Arnold was there on the 1st of June to kill, and there can't be any doubt in anybody's mind but that's the case.

COURT

> The person calling the witness does not vouch as to the witness's good moral character or even that all of his testimony, particularly on cross-examination will be true.
>
> Under the circumstances, we believe that the remarks of the prosecutor were fair comment upon Cagnina's testimony.

G. Discussing the Law

Discussing certain concepts of law in your closing argument is permissible. The court again allows wide latitude in this area of argument.

1. Reasonable Doubt

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770 (App. Div. 2 2009).

State v. Kerekes, 138 Ariz. 235, 673 P.2d 979 (App. Div. 1 1983).

State v. Thornton, 26 Ariz.App. 472, 549 P.2d 252 (App. Div. 2 1976).

2. Arguing a refused instruction

State v. Starr, 119 Ariz. 472, 581 P.2d 706 (1978).

3. Intent

State v. Matus, 15 Ariz.App. 97, 486 P.2d 209 (App. Div. 1 1971) (proven by the circumstances).
State v. Ferguson, 119 Ariz. 201, 580 P.2d 338 (1978) (leaving out *mens rea*).

4. Self defense - "Put yourself in the position of the defendant."

State v. Anderson, 102 Ariz. 295, 428 P.2d 672 (1967).

5. Aiders and abettors

State v. Ferguson, 119 Ariz. 201, 580 P.2d 338 (1978).

6. Insanity

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).

SUMMARIES

1. Reasonable Doubt

State v. Edmisten, 220 Ariz. 517, 207 P.3d 770 (App. Div. 2 2009).

PROSECUTOR

The prosecutor reminded the jury that it had the burden to prove the defendant's guilt beyond a reasonable doubt. During rebuttal argument, the prosecutor asserted:

> [E]ven if Mr. Edmisten had taken those drugs without his knowledge, all that allows you to do is say, gee, given that fact, is there evidence that he intended to commit these crimes independent of that?

He then summarized all the evidence it had presented to show Edmisten was "able to form the intent to make decisions" and concluded the jury should find this was overwhelming evidence of guilt.

COURT

The prosecutor properly clarified the instructions concerning who had the burden of proof, and emphasized the issue of whether the state had met its burden to prove Edmisten had the requisite mental state in light of the evidence of involuntary intoxication.

State v. Kerekes, 138 Ariz. 235, 673 P.2d 979 (App. Div. 1 1983).

PROSECUTOR

> In a civil case--civil case, being a contract dispute between two business partners, or an auto accident case--in a civil case the Plaintiff, in order to win, must prove his case by just a little bit past half way. If the scale is tipped 51%, one percent past half way--past the 50% mark--the Plaintiff wins. That is a civil case.
>
> We, however in a criminal case, the State is the Plaintiff in a criminal case--the State must prove its case beyond a reasonable doubt. Clearly, that's more than 51%. how much more, nobody knows.
>
> The Judge will not give you a number figure. Nobody can give you a number figure. It might be 70%; it might be 80%. It even could be like a bar of Ivory Soap, 99%.
>
> You are the ones that will have to figure out what a reasonable doubt is, when the State has proved its case beyond a reasonable doubt.
>
> Reasonable doubt is not beyond any shadow of a doubt. It does not mean beyond any doubt whatsoever. Because, ladies and gentlemen, in every criminal case, some doubt exits. There's always doubt.

COURT

[Counsel for the defense failed to object, thus waiving the issue on appeal as no fundamental error existed.] The court went on to say:

> When the rest of his argument is read, it is clear that the prosecutor did not postulate his argument so as to instruct the jury that if they were convinced by 70% or 80%, they could convict the appellant. Rather, the prosecutor merely indicated to the jury that reasonable doubt is a concept which is hard to define and must be determined by the jury in each case.

State v. Thornton, 26 Ariz.App. 472, 549 P.2d 252 (App. Div. 2 1976).

PROSECUTOR

> I am sure in every case, in any case that is tried in the criminal court, there is always

going to be some doubt, but the concept is reasonable doubt. Now, we take that to mean that some doubt that you arrive at through your reasoning process, either from some significant defects, some significant gapping [sic] defect in the State's case or from some evidence, some positive evidence that has been presented by the defense. I don't think there is a defect in the State's case which would rise to the level of reasonable doubt when you consider the totality of the evidence which has just been summarized and which had previously been presented. I don't think the defense has come forward with anything which would rise to the level of reasonable doubt.

COURT

The argument was proper.

2. Arguing a Refused Instruction

State v. Starr, 119 Ariz. 472, 581 P.2d 706 (1978).

PROSECUTOR

The prosecutor argued law of circumstantial evidence based upon an instruction which was refused by the trial court.

COURT

Law stated correctly and in response to defense attorney's arguments on circumstantial evidence.

3. Intent

a. Proved by Circumstances

State v. Matus, 15 Ariz.App. 97, 486 P.2d 209 (App. Div. 1 1971).

DEFENSE

[I]t is necessary that the criminal act be accompanied by a specific or particular intent without which the crime is not committed, thus, in the case of burglary, second degree, a necessary fact to be proved is the intent in the mind of the defendant, of the specific intent to commit petty theft or grand theft, or any felony.

(Emphasis added.)

PROSECUTOR

> The defendant's state of mind obviously, unless he states what was going on at that time, is circumstantial. You prove this by what happened and what the reasonable inferences you can draw from what in fact did happen.

COURT

Proper argument.

b. Leaving Out *Mens Rea*

State v. Ferguson, 119 Ariz. 201, 580 P.2d 338 (1978).

PROSECUTOR

A portion of prosecutor's argument discussed only the *actus reus* of the crime, leaving out the *mens rea*. The court overruled appellant's objection that the law was being misstated.

COURT

> As the prosecutor had previously explained the requirement of intent to the jury, and the court correctly instructed the jury on the elements of the crimes charged, we find no error.

4. Self Defense - Put Self in Position of Defendant

State v. Anderson, 102 Ariz. 295, 428 P.2d 672 (1967).

FACTS

Self defense case.

PROSECUTOR

The County Attorney argued that they should place themselves in the position of the defendant and determine what they would have done under the circumstances.

JURY INSTRUCTION

> In determining whether the defendant acted in necessary self-defense or what appeared to be her necessary self-defense, it is your duty to look at the transaction from what you believe from the evidence was the standpoint of the defendant as a reasonable person at the time, and consider the same in the light of the facts and circumstances as you believed they appeared to the defendant as a reasonable person at the time....

COURT

The County Attorney's argument restated the court's instruction and attempts to combine this direction with the state's theory of the case. Argument was proper.

5. Aiders and Abettors

State v. Ferguson, 119 Ariz. 201, 580 P.2d 338 (1978).

PROSECUTOR

Did [defense counsel] talk to you in this analogy, you heard about the Circle K and mere presence?

Did he talk to you about the fact that the getaway driver in an armed robbery is just as guilty as the people that pulled the armed robbery, because he is an aider and abettor?

Did he raise the analogy, show you you don't actually have to hold the gun to be guilty of an armed robbery?

If you are the one that enables the people to get in the car, to take off, get them escaped from the armed robbery, you are as much a part of the armed robbery as the one holding the gun.

COURT

No error. The prosecutor had previously explained the intent requirement to the jury and the trial court correctly instructed the jury on the elements.

6. Insanity

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).

PROSECUTOR

Prosecutor said that the defense had the burden of producing "evidence that makes it highly probable" that Moody was insane at the time of the murders and was "not malingering."

COURT

Moody fails to explain how the prosecution misstated the applicable burden in this case and cites no authority supporting his position.

H. Reading the Transcript

State v. Hauss, 142 Ariz. 159, 688 P.2d 1051 (App. 1984) (excluded transcript).

State v. Sanders, 110 Ariz. 503, 520 P.2d 1136 (1974) (transcript of defendant's testimony).

SUMMARIES

State v. Hauss, 142 Ariz. 159, 688 P.2d 1051 (App. 1984).

The trial court properly found that although the prosecutor apparently read from an excluded transcript of a tape recording of statements by defendant, there were no grounds for granting defense's motion for mistrial. the statements had been introduced with the tape recording and as far as the jury knew, the prosecutor was reading from her notes. The defense failed to demonstrate that prejudice had resulted.

State v. Sanders, 110 Ariz. 503, 520 P.2d 1136 (1974).

PROSECUTOR

The prosecutor read the defendant's testimony from the transcript (over objection) because his testimony was difficult to understand.

COURT

> We fail to see how the defendant could be prejudiced by such a procedure. The fact that the trial was short and the testimony easily remembered would not alter the fact that the prosecutor's memory may have been faulty and he wished to rely on the transcript. There was no error.

I. Commenting Upon Defense's Statements During Opening

The jury has the right to consider counsel's opening statement. *State v. Adams,* 1 Ariz.App. 153, 400 P.2d 360 (1965).

IV. IMPROPER COMMENTS

This section discusses arguments by the prosecutor which were deemed improper by the court. Although improper, most of the arguments were not reversed.

The topics covered are:

A. Criteria for Mistrial or Reversal
B. Arguing Outside the Evidence
C. Commenting Upon the Defendant's Silence or Failure to be a Witness
D. Appeals to the Passion or Prejudice of the Jurors
E. Personal Opinion
F. Commenting Upon the Defense Attorney's Reserving Opening Statement
G. Commenting Upon Suppressed Evidence
H. Intimating That Defense Counsel Fabricated a Defense
I. Misstatement of Facts
J. Discussing the Law
K. Commenting Upon Suppressed Evidence and Objections
L. Commenting Upon Failure of Court to Direct a Verdict
M. Discussing Possible Punishment
N. Questioning Integrity/Competence of Defense Experts
O. Final Argument Beyond the Scope of Defense Argument
P. Inferences of Guilt from Defense Counsel's Ethical Conduct

A. Criteria for Mistrial or Reversal

> The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks.

Sullivan v. State, 47 Ariz. 224, 55 P.2d 312 (Ariz. 1936).

The rule enunciated in *Sullivan* is still good law and is cited in *State v. Roque,* 213 Ariz. 193, 224, 141 P.3d 368, 399 (2006); *State v. Prince,* 204 Ariz. 156, 161, 61 P.3d 450, 455 (2003); *State v. Lozano,* 121 Ariz. 99, 588 P.2d 841 (1978); *State v. Moore,* 112 Ariz. 271, 540 P.2d 1252 (1975); *State v. Maddasion,* 24 Ariz.App. 492, 539 P.2d 970 (1975); *State v. Minniefield,* 110 Ariz. 599, 522 P.2d 25 (1974); *State v. Gonzales,* 105 Ariz. 434, 466 P.2d 388 (1970).

B.Arguing Outside the Evidence

Except for matters of common knowledge, it is improper for an attorney to argue outside the evidence. All improper argument is really a subset of this general classification.

State v. Leon, 190 Ariz. 159, 945 P.2d 1290 (1997) (comment defendant's previous drug transactions not in evidence).

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (App. Div. 1 1997). (comment on defendant's failure to provide an expert witness).

State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (App. Div. 1 1996).

State v. Salcido, 140 Ariz. 342, 681 P.2d 925 (App. Div. 2 1984) (vouching, arguing evidence not before the jury).

State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971) (reference to the prevalence of crime).

State v. Branch, 108 Ariz. 351, 498 P.2d 218 (1972) (comments on the fear of racial retaliation).

State v. Childs, 113 Ariz. 318, 553 P.2d 1192 (1976) (references to other events).

State v. Filipov, 118 Ariz. 319, 576 P.2d 507 (1977) (calling defendant a criminal, "call later and apologize for voting not guilty" -- reversal mandated).

State v. Gay, 108 Ariz. 515, 502 P.2d 1334 (1972) (the prosecutory had seen the witness "several times.").

State v. Gonzalez, 105 Ariz. 434, 466 P.2d 388 (1970) (remarks on religion and social class were improper, but not inflammatory).

State v. Lee, 110 Ariz. 357, 519 P.2d 56 (1974) (comment on an absent witness).

State v. McGill, 101 Ariz. 320, 419 P.2d 499 (1966) (referring to the defendant as a dope addict).

State v. O'Neil, 102 Ariz. 299, 428 P.2d 676 (1967) (rebutting defense argument of the defendant's unblemished record).

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (1975) (telling the jury about meetings with psychologists).

State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978) (comment on sodomy in jail).

State v. Stoneman, 115 Ariz. 594, 566 P.2d 1340 (1977) (introduction of a second different pair of tennis shoes not in evidence for the jury's edification as to the various types of soles on tennis shoes).

State v. Woodward, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973) (comment on the fact that the jury doesn't get all the evidence presented to them).

State v. Stout, 5 Ariz.App. 271, 425 P.2d 582 (App. 1967) (comment on the identification of a witness outside the courtroom).

State v. Mincey, 130 Ariz. 389, 636 P.2d 637 (1981) (comment on the knowledge of a co-defendant).

SUMMARIES

State v. Leon, 190 Ariz. 159, 945 P.2d 1290 (1997).

PROSECUTOR

Defense counsel in the opening stated this is not TV. There is not the benefit of all the items you see. We're not going to have the inside information as to what occurred in prior transactions if there were any prior transactions.

COURT

Here, nothing was admitted pertaining to previous drug transactions, which alone should have precluded the state from mentioning them in closing. Similarly, by implying that police reports contained other "bad acts," the deputy county attorney referred to matters not in evidence and presumably inadmissible under Rule 404, Ariz.R.Evid. This misconduct was particularly egregious considering that the court had earlier excluded statements regarding a prior incident because they had not been formally disclosed in advance of trial.

(Citations omitted.)

State v. Corona, 188 Ariz. 85, 932 P.2d 1356 (App. Div. 1 1997).

PROSECUTOR

They did not provide you with an expert witness to counter what Detective Luebkin said. So you will decide how much weight to give to Detective Luebkin's testimony as far as his experience in the area of gangs, his credentials, his contacts with gang members, his investigation of gang-motivated crimes.

COURT

Because there was no mention during the trial that the defendant had retained or even consulted an expert witness on gangs, unlike *Keen* in which the defendant had received a sample for the very purpose of independent consultation, the prosecutor's comment was improper and the defendant's objection should have been sustained.

State v. Jones, 188 Ariz. 534, 937 P.2d 1182 (App. Div. 1 1996).

FACTS

Defendant's wife, ChJ, testified for the state as a hostile witness. The prosecutor unsuccessfully attempted to have ChJ acknowledge statements she had made during an October 1992 interview with Detective Eric Stall. At trial, ChJ consistently responded that she did not remember making those statements attributed to her by the prosecutor.

When Detective Stall testified, the prosecutor asked him, "Did you ask [ChJ] whether or not she thought that her husband was capable of doing this, meaning sexually assaulting [CJ]?" Stall responded, "Yes." There is no evidence in the record, however, as to ChJ's actual response to this interview question.

PROSECUTOR

And even mom says to Detective Stall, it is not within her daughter's nature to lie. And then she also says something else. She wouldn't put it past her husband to do those things to her daughter.

COURT

The remark was clearly improper because it was based on facts that were not in evidence. Such a remark requires a new trial if it was probable that the remark affected the verdict, thus denying the defendant a fair trial.

State v. Salcido, 140 Ariz. 342, 681 P.2d 925 (App. Div. 2 1984).

PROSECUTOR

> In addition, he made a big deal about where's the gas tank, where are the fingerprints? . . . Well, I went over with the agents at lunch time and saw the tank and Mr. McKinney, if he really wanted that tank here, he could have the, had had the tank here just as easily as I could have. the tank is [hard to get to]. . . and there is really no need to do so when the agents have, in fact, seen the tank and can testify where it is and its size. So, there's just no need to do it.

COURT

> In the present case, whether the prosecutor's remarks are viewed as "testimony" from his personal knowledge or as vouching for the credibility of the state's witnesses, they were clearly improper and called to the jurors' attention facts which were not in evidence and which pertained to crucial matters for the jury's determination. The tenor of the argument implied the prosecutor's recognition that the testimony of his witnesses regarding the size of the gas tank might not be sufficient to undermine the appellant's credibility in the eyes of the jury, and there is a strong probability that the subsequent verdict was influenced by his remarks. The trial court erred in refusing to grant appellant's motion for mistrial.

State v. Williams, 107 Ariz. 262, 485 P.2d 832 (1971).

PROSECUTOR

"* * * "The crime rate went up in Phoenix last year one hundred sixteen percent" and thereafter made two further references to the rising crime rate.

COURT

> We do not, however, think this is reversible error. Although there are precedents to the contrary, it has been repeatedly held that a reference by the prosecuting attorney in his argument to the prevalence of crime is not improper.
>
> We agree that the reference to 116 percent goes beyond the realm of proper argument, because it alludes to a fact not in evidence, but we note that no objection was made at the time of the prosecution's argument.

State v. Branch, 108 Ariz. 351, 498 P.2d 218 (1972).

DEFENSE

In his remarks to the jury, the defense counsel commented upon the failure of the state to present testimony from members of the black community in regard to the defendant's reputation for truth and veracity. The state's witnesses who testified about Branch's credibility were three police officers, and the defense counsel maintained that only someone living in the defendant's neighborhood would know his reputation for credibility.

PROSECUTOR

In response to the above, the deputy county attorney stated:

> Why don't we call some Negro people? Well, these officers deal down there every day. They talk to the Negro citizens. They deal with problems down in that area, and I submit to you they know his reputation as well as any Negro. Do you think for one minute--I don't mean to bore you, but do you think for one minute that we are going to be able to get a Negro to come and testify against that man? That Negro will be scared to come up from the south side to testify against this man, that is why we could never get anybody. That is why.
>
> He would be scared to come and testify against Mr. Branch--
>
> (DEFENSE: I object to this kind of evidence outside of the record. It is inflammatory.)
>
> THE COURT: 'I don't know whether it is fair comment or not, but it has been made and I think there is no evidence in this record that anybody would be afraid to testify. It is a matter of inference, if there is one, from the evidence. I will leave it to the jury's good judgment to decide whether it is fair comment.'

COURT

Here the remark was not supported by the evidence and the trial court properly informed the jury that there was no basis in the record for such a statement. Allowing the jury to decide whether the remark was fair comment, however, was not proper. (Jury instruction and harmless error)

State v. Childs, 113 Ariz. 318, 553 P.2d 1192 (1976).

PROSECUTOR

> I don't think we would have ever heard that if it hadn't been for Brenda. But you make up your own mind about that. And I don't know how many other instances there may have been that we will never hear about.

COURT

> This statement was improper, and the objection by defense counsel was correctly sustained by the trial court with an admonishment to the jury to disregard the statement. However, we do not feel that the remark was sufficiently prejudicial to warrant reversal.

State v. Filipov, 118 Ariz. 319, 576 P.2d 507 (1977).

PROSECUTOR

"The state went out of its way to get another criminal in to put the finger on him (Defendant)."

Prosecutor told the jurors not to call later and apologize for voting not guilty.

COURT

These were two of several improper arguments mandating reversal.

State v. Gay, 108 Ariz. 515, 502 P.2d 1334 (1972).

FACTS

The state did not call Mrs. Phillips, so the defense called her to contradict state's witness.

PROSECUTOR

In the prosecution's rebuttal, the County Attorney stated to the jury that Mrs. Phillips had been seen by the prosecutor on several occasions. Defense counsel objected that this was arguing from matter not in the record and got an equivocal ruling. The prosecutor then went on to argue to the jury that:

> At any rate you saw the woman. She was emotional and she had physical injuries. She was in pain here today. That is why she didn't want to testify and I was not going to bring her in here and put her through this again. That is why I didn't have Vera Phillips here.

COURT

> There is no question but that the latter part of this statement, in which the prosecutor told why he didn't call her, was improper. We cannot justify it as invited error since we do not have the defense's closing argument. Defendant contends that the statement was made to engender the passion and prejudice of the jury. There is nothing in the record to show that such was the prosecutor's purpose, or that the statements had that effect. In any event, the complete answer is that the defense made no objection to the statement, no request to instruct the jury to disregard it, and no request for a mistrial, so that he has no standing in this court to complain of that particular error.

State v. Gonzales, 105 Ariz. 434, 466 P.2d 388 (1970).

PROSECUTOR

The prosecutor accused defense counsel of talking "out of two sides of his mouth, or as the Indian might say a forked tongue." He referred to one of the defendant's chief witnesses as a "liar," and called her testimony "dishonest." Reference was made to defense counsel as a "poor, humble, simple little fellow," who was playing games with the jury. The prosecutor made several references to the bible, religion and races. Possibly his most callous remarks were directed to the function of the jury: "Let's quote the bible and be generous. Let's go out here 400 yards and open the gates and let him out. And when somebody comes along and kills you and they ask the County Attorney, 'What kind of a job are you doing over there?'--I won't have the job then--but as County Attorney, I will tell the survivors, 'Well, we have got kind hearts. We don't prosecute anybody.'"

COURT

The prosecutor's remarks were, to say the least, improper.

Despite the impropriety of the prosecutor's remarks, we do not find them so inflammatory, offensive and prejudicial as to require a reversal.

Our refusal to reverse because of the prosecutor's remarks is further supported by defense counsel's failure to object to the remarks at the time they were made.

State v. Lee, 110 Ariz. 357, 519 P.2d 56 (1974).

DEFENSE

There was a witness there. His name was Snavely. He's not in Court. Guzetta obviously knows him. He's not in Court.

Who knows where he is? Who knows whether he's available? If they are going to make a case all these months afterward and they want a jury to feel there is no lack of evidence, they feel there is sufficient proof, why don't they bring in someone who was right there. Maybe he couldn't testify that they saw the transfer but they could testify, 'I was there. I got out of a car. I was the driver of the car,' and bingo that's the man or maybe bingo that's not the man.

Neither I nor Mr. Ostlund are allowed to speculate as to why Snavely is not here because it is not in evidence one way or the other, but the fact remains when you consider whether there is sufficient evidence should not you consider the fact that the evidence is lacking in that an eyewitness to the person involved, the person who made the sale, has not been brought in, as is the burden of the prosecutor, not the defendant.

PROSECUTOR

To which the State replied in its closing argument:

There was a suggestion about the other person who was around the area, Mr. Snavely, and we are not allowed to tell you where he is because we don't know where he is, but we are allowed to draw reasonable inference from the testimony.

COURT

The defendant did not object to these remarks either at the time they were made or after the close of the argument before the matter was submitted to the jury, and the remarks of the prosecutor, while not substantiated by the evidence, were not reversible error.

State v. McGill, 101 Ariz. 320, 419 P.2d 499 (1966).

FACTS

The witness, Dr. Harper, a resident physician at the Maricopa County Hospital, in his report of an examination of the defendant at the hospital following his arrest, stated, "I suspect this pt. [sic] is a narcotics addict, but cannot prove it at this time." He testified that this was tentative diagnosis which he did not later substantiate.

PROSECUTOR

The prosecutor in his summation to the jury referred to the defendant as "an addict" and a "dope addict."

COURT

> An addict is one who has surrendered himself to 'something habitually or obsessively' (Webster's Seventh New Collegiate Dictionary). There was no competent evidence before the jury that the defendant in this case had habitually surrendered to drugs or that he had ever been convicted of a narcotics charge. Without such evidence such a statement in a summation to the jury by the prosecutor was improper.

State v. O'Neil, 102 Ariz. 299, 428 P.2d 676 (1967).

DEFENSE

> Did he (Defendant) ever commit any crime? Thirty-five years and an unblemished record. If he had them you would have heard about them on cross-examination.
>
> In this particular case, what evidence was there that before December 4th that this man had ever done anything wrong in the world except maybe be stupid, not too rich, and work hard.

PROSECUTOR

> Now, he said this person has got an unblemished record, there wasn't anything mentioned about that but he knows why. That was a misstatement. I won't go any further, but that was a misstatement, I can prove it.

COURT

> The State's contention, that this is a case where the doctrine of "invited error" is applicable is without merit.
>
> We are of the opinion that under the facts of this particular case the county attorney's statements go beyond a pertinent reply to the above remarks made by defendant's counsel and undoubtedly were necessarily prejudicial.
>
> The references and insinuations to a prior criminal record made by the county attorney in his closing argument and for which he made no offer of proof constitute reversible error.

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975).

PROSECUTOR

The prosecutor told the jury that the defendant had seen four psychiatrists and not just the two psychiatrists who testified.

COURT

Not reversible because defense objections were sustained and curative instructions were given.

State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978).

DEFENSE

The defense attorney in his closing argument commented upon the state's failure to produce many corroborating witnesses in a jail sodomy case.

PROSECUTOR

The prosecutor responded that jail inmates are reluctant to testify and that, "Some of them had gone on to bigger and better things in the Arizona State Prison."

COURT

> Even if we agree [that the statements were improper], we do not believe the statements were so prejudicial, offensive, or inflammatory as to require reversal. . .

State v. Stoneman, 115 Ariz. 594, 566 P.2d 1340 (1977).

FACTS

A pair of the defendant's tennis shoes were introduced at trial.

PROSECUTOR

During closing, the prosecutor showed a new and different pair of tennis shoes which had not been introduced into evidence so that the jury could compare the soles of the defendant's shoes with that of the new and thereby buttress the state's argument concerning the footprints found at the scene of the crime.

COURT

> We have examined the record with respect to the argument which the prosecution made concerning the tennis shoes and do not think that there was a reasonable possibility that the verdict would have been different had the State's argument concerning the tennis shoes not been made.

State v. Woodward, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973).

PROSECUTOR

> You can bet the information they gave the judge was sufficient to get the judge to sign the warrant. If you think the jury hears all the evidence on this search warrant is [sic] a criminal case, you're crazy . . . If this was a mere presence case, it wouldn't have gotten this far. The Court would have thrown us out last week, but he hasn't.

COURT

> The appellee argues that although these may have been improper arguments, they were invited comments encouraged by improper comments by defense counsel.
>
> The fallacy of applying the rule in this case becomes apparent when the transcript reveals that all of the supposedly improper arguments of defense counsel were made by the attorney representing the co-defendant and not by the appellant's attorney.
>
> Any one of the improper statements taken alone might not have warranted a mistrial, but the cumulative effect was highly prejudicial with a strong probability that the statements influenced the jury verdict.

Reversed and remanded.

State v. Stout, 5 Ariz.App. 271, 425 P.2d 582 (App. 1967).

PROSECUTOR

> * * * Mr. Vance [defense attorney] said I brought you over here and that I pointed out the defendant, and if any of you were sitting out there as you have most of the trial when we are out of chambers, you may have seen her come over today. I was not with her, I sent her by herself to find the man she saw that night. She came over, and after she got here, I went and asked her, 'Is he around here.' and she said 'yes.' She said the defendant, Mr. Stout.

COURT

"We do not believe that the remarks were so prejudicial that their effect could not have been obviated by a proper instruction to the jury."

State v. Mincey, 130 Ariz. 389, 636 P.2d (1981).

PROSECUTOR

"Co-defendant knew the people invading the house were cops."

COURT

Trial court sustained objection and instructed the jury to ignore remarks outside the evidence adduced at

trial. Appellate court held that error was cured.

C. Commenting Upon the Defendant's Silence or Failure to be a Witness

1. It is improper and reversible error to comment upon the defendant's refusal to be a witness at his trial.

A.R.S. § 13-117 provides in part:

> B. The defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings.

State v. Trostle, 191 Ariz. 4, 17, 951 P.2d 869, 882 (1997)(Defendant is asking jury to find him not guilty through his lawyer).

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229 (1965)(defendant has not seen fit to take the stand and deny or explain).

State v. Still, 119 Ariz. 549, 582 P.2d 639 (1978) ("I've never heard an explanation. . .").

State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976)("No one, no one, no one. . ." took the stand).

State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1973)(the witness didn't explain).

State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956) ("only God, the decedent and the defendant could tell").

SUMMARIES

State v. Trostle, 191 Ariz. 4, 17, 951 P.2d 869, 882 (1997).

PROSECUTOR

The prosecutor argued that only two individuals knew detailed information of the crime: "One is Jack Jewitt and the other one is sitting right here at the table asking you not to hold him accountable through his lawyer."

COURT

> Although this statement constitutes an impermissible comment on defendant's failure to testify, we cannot say it contributed to the jury's verdict in view of the overwhelming evidence of guilt and the context within which it was made. Any error was harmless beyond a reasonable doubt.

Griffin v. California, 380 U.S. 609, 611, 85 S.Ct. 1229, 1231 (1965).

PROSECUTOR

He would know that. He would know how she got down the alley. He would know

how the blood got on the bottom of the concrete steps. He would know how long he was with her in that box. He would know how her wig got off. He would know whether he beat her or mistreated her. He would know whether he walked away from that place cool as a cucumber when he saw Mr. Vissasenor because he was conscious of his own guilt and wanted to get away from that damaged or injured woman.

These things he has not seen fit to take the stand and deny or explain.

And in the whole world, if anybody would know, this defendant would know.

Essie Mae is dead, she can't tell you her side of the story. The defendant won't.

COURT

Reversible error.

State v. Still, 119 Ariz. 549, 582 P.2d 639 (1978).

PROSECUTOR

I've never heard an explanation (pointing to the defense table) for why this man told Mr. Young the story about having a mine down in Mexico.

COURT

This statement was a comment upon the defendant's silence--reversed.

State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976).

PROSECUTOR

The evidence in this case, that is the photographs that were entered into evidence, and the testimony from witnesses that came up here and testified is undisputed and uncontradicted testimony.

No one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses, by Joe Speed, by Pete Hansen, and by Jeannie Johnston, and the testimony read to you by Esther McCluer, and the testimony of Detective Ysasi and Nickolan.

MR. GERHARDT: Your Honor, if we may note another objection?

THE COURT: Yes, indeed.

COURT

The comment "no one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses" was certainly calculated to

point out to the jury that the defendant had not taken the stand and testified and was, we believe, fundamental error.

(Reversed)

State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1973).

PROSECUTOR

So, if we are to presume--if we are to presume Dr. Tuchler is to be the key in this case and he is going to extend--he's going to extend and explain away the following of Jeannie's failure that she did not have to explain away, or that she did not explain away off of that witness stand, well, let's examine Dr. Tuchler more closely. Let's examine him more closely.

COURT

This is a direct comment on the defendant's failure to take the witness stand. Whether this was intentional or accidental is of no moment. The defense motion for a mistrial should not have been denied. In a case where the defendant's rights against self-incrimination are violated it is fundamental error.

State v. Jordan, 80 Ariz. 193, 294 P.2d 677 (1956).

FACTS

Murder case where defendant did not testify.

PROSECUTOR

The prosecutor stated that only God, the decedent and the defendant could tell what happened.

COURT

Jury's attention was focused upon the defendant's failure to testify – reversed.

2. <u>It is Improper and Reversible Error to Comment Upon the Defendant's Assertion of 5th Amendment Rights Prior to Trial</u>

State v. Downing, 171 Ariz. 431, 433, 831 P.2d 430, 434 (App. Div. 1 1992).

State v. Padilla, 110 Ariz. 392, 519 P.2d 857 (1974) (the defendant didn't tell the police at the time of his arrest).

State v. Dykes, 114 Ariz. 592, 562 P.2d 1090 (1977) (the defendant had an "obligation to tell").

State v. Sorrell, 132 Ariz. 328, 645 P.2d 1242 (1982) (defendant wanted time to think so he invoked *Miranda*).

But see State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988)(prosecutor may comment on defendant's invocation of rights pertaining to voluntariness issue--BE CAREFUL!).

SUMMARIES

State v. Downing, 171 Ariz. 431, 433, 831 P.2d 430, 434 (App. Div. 1 1992).

FACTS

On redirect examination of the second undercover officer, the prosecutor asked questions regarding the length of time it took to book Downing at the jail. The prosecutor asked, "Forty-five minutes?" The officer answered, "He refused to talk to us. He was not talking to us."

DIRECT EXAMINATION OF FIRST UNDERCOVER OFFICER

Q. Okay. Did-at the conclusion of that hour, did Luther understand clearly, do you believe, of what his options were at that point?

A. I believe he understood them, and he invoked his rights and kept his rights, and we didn't ask any other questions. He asked for his lawyer.

***

Q. After an hour, he invoked his rights. I presume you mean his Miranda rights?
A. Right.
Q. Had he been Mirandized before that?
A. I don't think so.
Q. At the point in the conversation where he refused to become a [confidential informant], you say, "Okay. You are under arrest," and you then read his Miranda rights?
A. Right.
Q. He invoked his rights?
A. Right.

COURT

Because the conduct which took place in this case is so clearly proscribed by the law, and because it was not inadvertent nor a single occurrence, we find the trial judge erred in denying the motion for mistrial.

State v. Padilla, 110 Ariz. 392, 519 P.2d 857 (1974).

CROSS-EXAMINATION OF DEFENDANT

Q. Did you tell them about the truck pulling out of the driveway when you found out

you were charged with child molesting and the crime of rape?

A. No, sir.

Q. Did you ever tell the police about that truck coming out of the driveway?

A. I don't remember if I did or didn't say anything about the truck in the driveway.

PROSECUTOR

In that regard, Mr. Padilla admitted that he never told the officers his story. He didn't tell them when he was booked in. He didn't tell the officers about this man pulling out in a truck, Mr. Padilla didn't. Why? Because there was no man pulling out in a truck.

COURT

Had the trial been to a jury instead of the court the questions and arguments would have been reversible error.

State v. Dykes, 114 Ariz. 592, 562 P.2d 1090 (1977).

FACTS

The defendant drove away leaving his companions in the desert to die. Upon apprehension he asserted his 5th Amendment right to silence. He was charged with involuntary manslaughter.

PROSECUTOR

The prosecutor told the jury that the defendant has an obligation to tell the authorities that other persons were in the desert.

COURT

Reversed.

State v. Sorrell, 132 Ariz. 328, 645 P.2d 1242 (1982).

FACTS

Defendant invoked *Miranda*, and later gave a statement.

PROSECUTOR

In opening argument the prosecutor said that the defendant wanted time to think. In the final he repeated the argument and added that the defendant invoked his *Miranda* rights.

COURT

Improper comment on defendant's right to remain silent. (Reversed)

But see State v. Carrillo, 156 Ariz. 125, 750 P.2d 883

(1988)(prosecutor may comment on defendant's invocation of rights pertaining to voluntariness issue--BE CAREFUL!).

3. Improper, but . . .

State v. McKinley, 157 Ariz. 135, 755 P.2d 440(App. Div. 2 1988) (comment on defendant's failure to test semem sample is not comment on silence if it constitutes rebuttal).

State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988)(prosecutor may comment on defendant's invocation of rights pertaining to voluntariness issue—BE CAREFUL!).

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985) (victims had a limited right to speak).

State v. Fuller, 143 Ariz. 571, 694 P.2d 1185 (1 985)("Their only effort" is to tear down the state's case).

State v. Moya, 140 Ariz. 508, 683 P.2d 307 (App. Div. 1 1984)(there is no evidence whatsoever).

State v. Swartz, 140 Ariz. 516, 683 P.2d 315 (App. Div. 2 1984) (defendant can't get in front of the jury).

State v. Adamson, 140 Ariz. 198, 680 P.2d 1259 (App. Div. 2 1984) ("[Defendant] hasn't told us ....").

State v. Kerekes, 138 Ariz. 235, 673 P.2d 979 (App. Div. 1 1983) (the evidence presented on the witness stand is uncontroverted).

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983)(an unsworn statement of defendant) (defendant is not so stupid) (defendant cannot disprove the evidence).

State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (App. Div. 2 1983) (Defendant didn't testify).

State v. Covington, 136 Ariz. 393, 666 P.2d 493 (1983) (comment on the lack of evidence supporting a consent defense in a rape prosecution).

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983) (all the evidence points to defendant).

State v. Suells, 122 Ariz. 8, 592 P.2d 1274 (1979)(directing the jury's attention to the defendant).

State v. Miller, 108 Ariz. 303, 497 P.2d 516 (1972) (no one knows what happened except the victim and the defendant).

State v. Cota, 102 Ariz. 416, 432 P.2d 428 (1967) (defendant refused to testify).

State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1966) (where are the witnesses).

State v. Crumley, 128 Ariz. 302, 625 P.2d 891 (1981) (reference to defendant's failure to testify during an objection).

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981) (tape of defendant's statement).

SUMMARIES

State v. McKinley, 157 Ariz. 135, 755 P.2d 440 (App. Div. 2 1988).

COURT

The prosecutor's argument to the jury that McKinley had the opportunity to independently test the semen samples and failed to do so did not shift the burden of proof to McKinley. That issue has been decided adversely to him in *State ex rel. McDougall v. Corcoran,* 153 Ariz. 157, 735cP.2d 767 (1987), where the court found such argument was not a comment on defendant's silence if it constitutes rebuttal to the accused's challenge of the test results.

State v. Carrillo, 156 Ariz. 125, 750 P.2d 883 (1988).

The defendant argued his confession was involuntary because he was incapable (incompetent-retarded) of understanding his *Miranda* rights. With the court's permission, the prosecutor elicited testimony from a police psychologist about defendant's invocation of his *Miranda* rights after speaking with the police for a period of time. The prosecutor used this testimony in final argument.

PROSECUTOR

> Clearly Hector Carrillo knew he didn't have to talk to them [the investigating officers]. What does he say when Detective Lowe comes in, I'm not going to answer any more questions.

On appeal, the defense claimed this was an unconstitutional comment on defendant's invocation of his constitutional right to remain silent. The Arizona Supreme Court disagreed.

COURT

> The evidence was relevant to the key issue in the case--the voluntariness and reliability of defendant's confession, which was the only substantial evidence connecting him with the crime. On final argument, the prosecutor pressed the point home to the jury. There was nothing incidental or accidental about the entire procedure.
>
> [I]n the present case, Carrillo claimed he had not understood his rights and had not made a knowing waiver of his rights. When Carrillo stopped the final interrogation session and sought the aid of counsel, he vividly demonstrated an understanding of his predicament and of his constitutional rights. . . . We do not believe that either *Doyle* or *Wainwright* forbids the evidentiary use made in the present case.
>
> We do not believe the implicit promise of freedom from penalty recognized in *Doyle* and *Wainwright* embraces the concept that defendant may simultaneously claim his rights and, without fear of contradiction, claim that he did not understand the rights he claimed. We hold that the evidence of exercise of *Miranda* rights was admissible on the question of comprehension of those rights.

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985).

PROSECUTOR

> PROSECUTOR: In conclusion, this case deals with greed, it deals with power, it deals with money, all the things which are superior in and supreme to human life. The state also seeks justice, not by sympathy, but by evidence. You heard the evidence. You know what it is.
>
> You know what kind of just on New Year's Eve Patrick Redmond, Helen Phelps and. Marilyn Redmond had. They had no jury. They had a limited right to speak -
>
> DEFENSE: Your Honor, would you note my objection as to that?
>
> COURT: Yeah. [Prosecutor] is reminded also.
>
> PROSECUTOR: I'm referring to -

COURT: [Prosecutor], you hear what I said?

PROSECUTOR: Certainly.

COURT: Okay.

PROSECUTOR: Mrs. Redmond told you what happened there. You have heard it called a tragedy. A tragedy is an avalanche, a snowfall, an earthquake. It's not' something planned. It was planned. It was intentional. It was brutal.

You have the evidence, you have a duty. You have a duty to stand up and speak individually for the victims that evening. Mrs. Phelps risked here life when she tried to protect something sacred, her wedding ring, and yet she was forced to give it up just as she was forced to give up her life.

There is no doubt in this case. You heard about reasonable doubt. Is there a reason to acquit these two gentlemen? There is not. There is no reason. They are guilty beyond a reasonable doubt of each of those offenses. We ask you to find them guilty as charged. Thank you.

COURT

We find no violation of defendant's Fifth Amendment rights because we do not think the language was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.

State v. Fuller, 143 Ariz. 571, 694 P.2d 1185 (1985).

PROSECUTOR

Defense counsel is trying to do the best he can to represent his client, and he's doing the best he can. However, the State has a lot of evidence. The defense has no duty to present evidence, that's true. They've presented no evidence, nothing positive. Their entire effort is to tear apart the State's case, to tell you that these eyewitnesses don't know what they saw. That's his purpose here today.

COURT

This was not a comment directed to the fact that defendant didn't testify. Rather, it "reflected the prosecutor's opinion that the defense failed to present any positive or exculpatory evidence."

State v. Moya, 140 Ariz. 508, 683 P.2d 307 (App. Div. 1 1984).

FACTS

In a prosecution for forgery, the defense announced in opening argument that it would call a certain witness. That witness invoked the Fifth Amendment. The defense then proceeded to argue the incompetence of the victim and her testimony.

PROSECUTION

> Now, the case, according to Mr. Babbit [defense counsel] in his opening statements, was authorization, this case involved, according to Mr. Babbitt, authorization. The State submits to you, ladies and gentlemen, there is virtually zero evidence as to authorization in this case ... There is no evidence in this case whatsoever of authorization ... You don't have any basis whether or not that was a truthful statement to Susan Leedom.

COURT

> In the context of defense counsel's argument, it is clear that the prosecutor's remarks in closing argument constituted a comment about the lack of contradicting evidence, rather than appellant's failure to testify. Such comments are clearly permissible.

(Internal citations omitted.)

State v. Swartz, 140 Ariz. 516, 683 P.2d 315 (App. Div. 2 1984).

PROSECUTOR

> The second thing Mr. Roylston said was we are not going to deny that he wrote those checks. You can't deny that he wrote those checks. We have all this evidence that he wrote the checks. He can't get in front of you and say that. You would never believe anything else that he said. They have to admit to you that they wrote all the checks. I am going to finish up here with a few comments. First, there is no evidence of a mistake. The evidence comes from the witness stand and from the exhibits that are in evidence.

COURT

The motion for mistrial was untimely as it was made after the jury left to deliberate the verdict. Further, although the statement is "garbled," it is made in response to defense counsel's arguments.

State v. Adamson, 140 Ariz. 198, 680 P.2d 1259 (App. Div. 2 1984).

PROSECUTOR

> The same thing applies in this case, in a criminal case where you're dealing with circumstantial evidence. . . . All that rigmarole [sic] he went through. . . .And he did that for a reason.
>
> Now, he hasn't told us that. Nobody has told us he did it for a reason.

(Emphasis by the court)

COURT

The comment did not support an '"unfavorable inference against the defendant and, therefore, operate as a penalty imposed for exercising a constitutional privilege."' (Internal citation omitted.)

State v. Kerekes, 138 Ariz. 235, 673 P.2d 979 (App. Div. 1 1983).

PROSECUTOR

> Ladies and gentlemen, the evidence that has been presented on this witness stand has been uncontroverted, except for what the Defense lawyer has speculated about in front of you, what he's speculated, like lawyers' arguments is not evidence.

COURT

> The prosecutor's argument must be viewed in the contest of the arguments of the defense. Not every reference to the fact that testimony has been uncontroverted necessarily focused on the appellant's exercise of his right not to testify. The statement set out above, when viewed in the context of the case, does not focus on the appellant's decision not to testify.

(citations omitted)

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

PROSECUTOR

> You have an unsworn statement by the defendant out in California somewhere to the investigating officer in this case that he didn't do anything.

COURT

> This comment did not constitute a comment on appellant's right to remain silent. When appellant was arrested, he spoke to the arresting officers and did deny the charge. Therefore, the comment constituted a proper comment on something appellant had stated, and not on appellant's right to remain silent.

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

DEFENSE

The defendant "was not so stupid as to commit the offense with which he was charged."

PROSECUTOR

> After a prosecutor has tried a few cases--and I'm not suggesting that I'm the most experienced prosecutor in the world--but after you've tried a few cases, you tend to almost cringe when you hear defense attorneys making the same argument over and over again. I'm sure that every time they make it they think it's an original argument. I'm almost getting sick of hearing defense attorneys stand up and say how

could my client be so stupid as to do what he's charged with doing.

COURT

This comment by the prosecutor does not constitute a comment either on appellant's right to remain silent. We also note that the comment was invited by defense counsel's closing argument. We find no error.

State v. Suarez, 137 Ariz. 368, 670 P.2d 1192 (1983).

PROSECUTOR

Ladies and gentlemen, it is insurmountable. You look at the data up there, look at the transactions. Ask yourselves how would he disprove it if, in fact, he did it, and the figures make it very clear; the fact is it's an impossible thing to do. He cannot disprove it because in fact the defendant did what he's charged with having done.

DEFENSE

This is an improper comment on defendant's right not to testify. Defense counsel commented several times that Defendant was faced with the impossible task of proving "negative evidence," or that he did not take kickbacks.

COURT

This comment thus did not constitute a comment on appellant's right to remain silent or to present no evidence, but a clear comment in response to appellant's closing argument.

State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (App. Div. 2 1983).

DEFENSE

He, [Appellant] didn't testify. He doesn't know anything about the incident, and he couldn't be called as a witness. He couldn't add anything to the facts.

PROSECUTION

Mr. Clark told you that the reason he [Appellant] did not testify is because he didn't know anything about the incident, and can't remember it. I didn't hear any evidence to that effect. If you want to believe it, go ahead. There is no facts [sic] in evidence to support that argument.

COURT

Appellant contends that the prosecutor wrongfully commented on his failure to testify and that he was therefore denied a fair trial. (citation omitted) We do not agree. The doctrine of invited error applies here. The prosecutor's remark was invited

or occasioned by the accused's counsel and is not a ground for reversal.

(Internal citation omitted.)

State v. Covington, 136 Ariz. 393, 666 P.2d 493 (1983).

PROSECUTOR

The prosecutor called the jury's attention to the lack of evidence supporting the consent defense in a rape trial. The defendants claimed that because they were the only persons other than the victim who could testify, the prosecutor's comment directed the jury's attention to the fact they did not testify.

COURT

> [T]here was other conflicting evidence on the issue of consent ... All counsel argued that these factors supported a finding of either consent or non-consent. If the prosecutor had argued that there was no direct evidence of consent then this might be an improper comment. But that was not his argument. Under these peculiar circumstances, where neither appellant testified that the victim consented but nevertheless attempted to rely on this defense, we find the prosecutor's arguments to be within permissible bounds.
>
> We have carefully read the transcript of all of the closing arguments and find no indication that the prosecutor intentionally or unintentionally, directly or indirectly, commented on the appellants' failure to testify.

State v. Gillies, 135 Ariz. 500, 662 P.2d 1007 (1983).

PROSECUTOR

> All other evidence points to the defendant. His cigarette on the rock on top of her body, as in the car, all the physical evidence that had been taken from the vehicle, all her property, he didn't try to explain that because he couldn't. All of that evidence shows that there were two men involved and the defendant was one of the two.

COURT

The comments were "fair rebuttal" to comments by the defense as to the introduction of physical evidence "which had no real connection to the defendant" and did not focus the jury's attention on the defendant's choice to exercise his Fifth Amendment privilege.

State v. Suells, 122 Ariz. 8, 592 P.2d 1274 (1979).

FACTS

The defendant did not take the stand.

PROSECUTOR

How many of you saw him at the time she identified him, that she pointed to him, where was he looking? He wasn't looking at her, he was looking away. You can remember your observations of him during the course of this trial. Remember the way he looked when she pointed him out and when she told you about the rape, when she told you about the way he kissed her and how revolted she was. Remember your recollections of him, and your observations of him.

COURT

Improper, but not reversible because no objection.

State v. Miller, 108 Ariz. 303, 497 P.2d 516 (1972).

PROSECUTOR

Now, I don't know exactly what happened that night, nobody knows exactly what happened except for Mr. Lackey and Mr. Miller; but I would suggest to you this. We know one thing. The window was approximately six feet off the ground. I doubt whether one man could get up, open that window, and get in by himself. . . .

COURT

We do not believe this to be the case herein and hold that the comments were not erroneous. Counsel should be aware, however, that this court has been very strict in enforcing the 'no comment rule' on defendant's refusal to take the stand and that care should be taken to avoid crossing over the line into reversible error in arguments to the jury.

State v. Cota, 102 Ariz. 416, 432 P.2d 428 (1967).

PROSECUTOR

In the upstairs apartment, there was LeRoy Pino, Frank Cota, Pedro Valenzuela and Roy Singh, the undercover narcotics agent. Roy Singh left the room. He went to another room, an adjoining room. At which time, Cota pointed to Valenzuela and said, "There is that rat."

Pino then goes downstairs. A few minutes later who comes downstairs, Ladies and Gentlemen, but the defendant, Frank Cota, Pedro Valenzuela, who refused to testify, and who else but the person whose picture you saw and who has been identified as Roy Singh, the undercover state narcotics agent.

COURT

[W]hile we cannot say such is desirable or even proper behavior, on the other hand we do not feel that recalling this fact to the jury's attention could cause such prejudice to an otherwise fair trial as to necessitate a reversal.

State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1966).

PROSECUTOR

> Now, the defendant hasn't said, I didn't do it. He says, I wasn't there, and he brought three witnesses in to testify. He brought his mother, he brought his younger brother and he brought his older brother, and all of them testified: Where was the defendant between 7:00 and 8:00? It was like a record: Oh, yes David was home, I seen him sitting out in the front couch drinking beer and wine. Who was he with? He was with two other guys. Where are the other two guys; where are the other two guys that were drinking with him? He may have said: Well, they weren't willing to come in.
>
> This is a very important thing. This is an attempted robbery. Defense has a right of subpoena. Where are these other two fellows that could testify that he was out there? We submit there were no two guys.

And the second portion of the State's argument stated:

> Counsel for the defense has made a few points that I would like to clarify. He says, why doesn't the State have more evidence, where are all their witnesses? Well, we have a very unfortunate situation. Most robbers don't like crowds. They usually pick somebody all by themselves, and when the guy comes in and says that's the one, then they say just his word against mine. If we did that, if we failed to come to Court with just the one person, we might as well forget about it. If anybody wants to pick somebody by himself, he can rob him. Now, I ask is this logical?
>
> And all these officers--would it do me any good to bring more officers to testify they were at the scene, they went along in all this? There is no necessity for this, our Courts are crowded enough without garbaging it up.
>
> All we have to do is to show each material allegation. I submit to you that we have done so. The only man in the world besides the defendant that can testify as to whether he put the knife to Mr. Sego's throat is Mr. Sego's testimony, you heard his testimony and was he unsure? No.

COURT

> The statements questioned in the present case, when viewed in proper context with the state's entire line of argument, do not have the effect of focusing the jury's attention on the fact that defendant has not taken the stand. The first statement was in the nature of a comment on the evidence defendant had presented, attacking the weakness of his alibi witnesses. The second statement was answering defense counsel's reference to the fact that no other witnesses to the attempt testified for the state, and explained that only the two parties were present, the accused and the complaining witness. [Harmless error]

State v. Crumley, 128 Ariz. 302, 625 P.2d 891 (1981).

DEFENSE ATTORNEY

I told him not to testify because state didn't prove case.

PROSECUTOR

The prosecutor objected based on personal opinion and in the process of stating the objection incidental reference was made to the defendant's not testifying.

COURT

Invited error.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981).

DEFENSE ATTORNEY

"You heard from the defendant in every relevant way when you heard the tape of his statement." (Defendant declined to testify.)

PROSECUTOR

"You cannot cross-examine a tape recording."

COURT

Invited error (3-2 split).

D. Appeals to Passion or Prejudice of Jurors

Arguments which are submitted solely for the purpose of arousing the jurors passions or prejudices are improper.

State v. Morris, 215 Ariz. 324, 160 P.3d 203 (2007) (would you want defendant to do this to you).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004) (have no sympathy for defendant).

State v. Henry, 176 Ariz. 569, 863 P.2d 861 (1993) (improper to call defendant a psychopath).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) (asking jury to balance defendant's and victim's rights).

State v. Herrera, 174 Ariz. 387, 850 P.2d 100 (1993) (asking jury to do justice).

State v. Cardenas, 146 Ariz. 193, 704 P.2d 834 (App. Div. 2 1985)(not error to compare crime to other, more violent episode of sexual assault).

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985) (references to the suffering of the victims).

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984) (how would you like to be the victim).

State v. Valencia, 118 Ariz. 136, 576 P.2d 335 (1977) (If this were your wife or sister . . .).

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975) (There might be another little girl

in the town . . .)

State v. Filipov, 118 Ariz. 319, 579 P.2d 507 (1977) (calling defendant a gypsy).
State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980) (Pity for the family of the victim).
State v. Puffer, 110 Ariz. 180, 516 P.2d 316 (1973) (How many more times can society let this occur?).
State v. Galioto, 126 Ariz. 188, 613 P.2d 852 (1980) (Arson costs you money).
State v. Carrillo, 128 Ariz. 468, 626 P.2d 1100 (1980) (defendant tried to kill victim).
State v. Sullivan, 130 Ariz. 213, 635 P.2d 501 (1981) (references to pushers).
State v. Nelson, 131 Ariz. 150, 639 P.2d 340 (1981) (results of rape).
State v. Agnew, 132 Ariz. 567, 647 P.2d 1165 (1982) (compared defendant to Joe Bonnano).
State v. McLaughlin, 133 Ariz. 458, 652 P.2d 531 (1982) (financial motive).
State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983) cert. denied, 103 S.Ct. 3097 (a brutal senseless killing).

SUMMARIES

State v. Morris, 215 Ariz. 324, 160 P.3d 203 (2007).

PROSECUTOR

[W]hich one of you wants to volunteer? I want a show of hands on this one. Which one of you ladies-and we don't need guys on this one, because he didn't take guys. He only took women.

Which one of you want [sic] to volunteer to come sit here and have the defendant sit himself on your chest and say, Oh, that didn't hurt? Because the defense attorney is saying throw common sense out of [the] window. Which one? I challenge anybody to say, That is something I want to do.

And anyway, and on top of that, while he's sitting on my chest, which one of you, since the one lower left-hand side has the longer hair of the jurors, maybe she wants to have him grab her hair while he's sitting on her chest ... to grab it and pull it around her neck.

You think that's not going to hurt? You think one of you guys is going to volunteer for that? You can't leave your common sense aside. [Defense counsel] wants you to because he makes these arguments and says, well, we don't know what is in their heads. We don't know what is in Juror Number 1's head. Can you tell me you don't think it's not going to hurt when he sits on you?

Hey, Juror Number 1 or Juror Number 14, whatever it is, what if we put Winnie the Pooh tie around your neck? Are you going to enjoy that? Are you going to like it? Going to feel real good when you can't breathe?

COURT

Although the State argues that the prosecutor simply asked the jurors to apply common sense to the factual situation before them, the prosecutor's remarks did far more than make that request. Instead, the prosecutor singled out particular

jurors and addressed them personally, playing on their sympathy for the victims and fears of the defendant. Such remarks constitute misconduct.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).

PROSECUTOR

Prosecutor described the victim's suffering and ended his closing argument by telling the jury that Moody had no sympathy for the victims and asking them to have no sympathy for him.

COURT

The prosecutor's frank description of the murders themselves is permissible. Moody has failed to show fundamental error on this point. Nor does Moody cite any cases suggesting that it was improper to ask the jury to have no sympathy for him. Indeed, we encourage jurors not to decide cases based on emotion or sympathy. We conclude that such a statement passes muster as an exhortation to the jury to do its duty. Moody therefore fails to demonstrate fundamental error requiring reversal on this issue. [citations omitted].

State v. Henry, 176 Ariz. 569, 863 P.2d 861 (1993).

PROSECUTOR

When Mr. Henry was testifying all day Friday, did the word psychopath ever come to mind?

COURT

The court properly sustained the objection. Within the wide latitude of closing argument, counsel may comment on the vicious and inhuman nature of defendant's acts, but may not make arguments that appeal to the passions and fears of the jury.

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993).

PROSECUTOR

[T]he defendant and all defendants have rights and a right to a fair trial.

There has been a fair trial.

But there are other rights. All of us have rights, including [the victim]. Perhaps the most succinct rights, the most succinct discussion of the sort of rights that we all, including [the victim], have, were described in the Declaration of Independence in 1776....

[The victim's] rights were terminated on June 6 of 1988. She has no right to life. That was terminated with blows to her head. There is no liberty for a nine-year-old girl who is taken off of her bike, tied up and taken away from her family. And there certainly is no pursuit of happiness from the grave....

Your duty is to protect the defendant's rights and also [the victim's] rights.

COURT

Appeals to the jury's innate sense of fairness between a defendant and the victim may have surface appeal but cannot prevail. A jury in a criminal trial is not expected to strike some sort of balance between the victim's and the defendant's rights. The judge, not the jury, balances conflicting rights; the jury must find the facts and apply the judge's instructions. Accordingly, the clear weight of authority shows the impropriety of the prosecutor's statements. The statements encouraged the jury to decide the case on emotion and ignore the court's instructions. The statements should have been stricken and followed with corrective jury instructions. Because there were no objections, however, we again look for fundamental error.

State v. Herrera, 174 Ariz. 387, 850 P.2d 100 (1993).

PROSECUTOR

Now, it is as important to the state, who represents all citizens co-equally, that the correct person be identified as the person who did the crimes; that's why the evidence is marshalled. It is crucial, because I, of the state, have no interest, whatsoever, in convicting an innocent person. The state must have an interest only in marshalling sufficient evidence to convince you, beyond a reasonable doubt, that a person is guilty of that. If you find them guilty-that burden of proof remains until you leave this room and go to deliberate; that is the presumption of innocence because we are all, all of us are citizens, all of us could be vulnerable, but if we or anyone, and in this case, these defendants, having committed these crimes, then it is as important to our civilized society to maintain some semblance of stability, balance, law and order, whatever you call it.

....

To convict these defendants for the crimes charged based upon that evidence and law.

Then, if the state has met its burden and the law does apply, then you do your duty so a civilized society can keep going as we honor it in our country today; that's justice. I ask you to do justice.

COURT

We find that the prosecutor's statements did not violate defendant's rights. When

read in context, the prosecutor's statements about justice and protecting society do nothing more than tell the jury that, *if they find defendant guilty beyond a reasonable doubt*, then they have a duty to protect our society and our system of justice by returning a guilty verdict; justice is served when a jury requires the state to meet its burden of proof.

State v. Cardenas, 146 Ariz. 193, 704 P.2d 834 (App. Div. 2 1985).

There was no error where the prosecutor compared the defendant's crime to other, more violent episodes of sexual molestation in voir dire, opening statement, and closing statement.

State v. Hooper, 145 Ariz. 538, 703 P.2d 482 (1985).

PROSECUTOR

PROSECUTOR: In conclusion, this case deals with greed, it deals with power, it deals with money, all the things which are superior in and supreme to human life. The state also seeks justice, not by sympathy, but by evidence. You heard the evidence. You know what it is.

You know what kind of just on New Year's Eve Patrick Redmond, Helen Phelps and Marilyn Redmond had. The had no jury. They had a limited right to speak -

DEFENSE: Your Honor, would you note my objection as to that?

COURT: Yeah. [Prosecutor] is reminded also.

PROSECUTOR: I'm referring to -

COURT: [Prosecutor], you hear what I said?

PROSECUTOR: Certainly.

COURT: Okay.

PROSECUTOR: Mrs. Redmond told you what happened there. You have heard it called a tragedy. A tragedy is an avalanche, a snowfall, an earthquake. It's not something planned. It was planned. It was intentional. It was brutal.

You have the evidence, you have a duty. You have a duty to stand up and speak individually for the victims that evening. Mrs. Phelps risked here life when she tried to protect something sacred, her wedding ring, and yet she was forced to give it up just as she was forced to give up her life.

There is no doubt in this case. You heard about reasonable doubt. Is there a reason to acquit these two gentlemen? There is not. There is no reason. They are guilty

beyond a reasonable doubt of each of those offenses. We ask you to find them guilty as charged. Thank you.

COURT

We find no violation of defendant's fifth amendment rights because we do not thing the language was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the defendant's failure to testify.

(The court went on to say that the language used by the prosecutor was not prejudicial.)

State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. Div. 2 1984).

DEFENSE

How would you like to be sitting at the defense table charged with a crime, there's no physical evidence. You've got an eye witness. That's the sum total of the evidence. You can't really cross-examine them. How would you like to be sitting there thinking the police could have put something in a plastic bag and saved it for a couple of months and that could prove your innocence? You can't get at it. What would you be feeling right now?

PROSECUTOR

His big Complaint in this area is how would you feel if you were Gary Mitchell and you're on trial for a case like this and the enzymes were lost. I would just like to give you the converse of that and say how would you feel if you were Cheryle Morrison and you picked out the man that raped you and you said this is him, there is no doubt in my mind about that, and the jury found the guy not guilty because the police didn't refrigerate those enzymes? How would that feel? that would be a miscarriage of justice if that were the case, if Cheryl Morrison had to find out this man was found not guilty just because the police had not refrigerated those enzymes.

COURT

The comments were merely responsive to defense arguments.

State v. Valencia, 118 Ariz. 136, 576 P.2d 335 (1977).

PROSECUTOR

"If this were your wife or sister--"

(Court *sua sponte* interrupted, reprimanded the prosecutor, and instructed the jury to disregard.)

COURT

The appellant did not move for a mistrial. "No predicate for appellant review exists when there has been a failure to move for a mistrial."

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975).

PROSECUTOR

The prosecutor argued that there might be another little girl in town who would not be safe if the defendant were acquitted.

COURT

> It is unquestionable that in this case the prosecutor's remarks tended to put before the jury matters they should not consider. The question remains, however, whether under the circumstances of this case the jury was probably influenced by the remarks. We think not.
>
> Our review of the transcript leads us to conclude that the trial court's timely corrective measures were sufficient to prevent the prosecutor's remarks from influencing the jury. The trial court did not abuse its discretion by refusing to declare a mistrial.

State v. Filipov, 118 Ariz. 319, 579 P.2d 507 (1977).

PROSECUTOR

In a receiving stolen goods case, the prosecutor characterized the defendant as a "Gypsy" and implied he was like mafia.

COURT

One of several improper arguments which cumulatively mandated reversal.

State v. Marvin, 124 Ariz. 555, 606 P.2d 406 (1980).

PROSECUTOR

> There's only one person and one group of people I feel sorry for. That's the family of this man right here that has been ignored. The person who can't see his family anymore, can't see his grandchildren, and his daughters and grandchildren can't see him.

COURT

> Counsel are allowed great latitude in closing arguments, even to the extent of making emotional statements. *Gonzales, supra.* The comment, while. appealing to the jury's sympathy, was not so improper as to mandate reversal. In view of the overwhelming evidence of appellant's guilt, it cannot be said that the jury was thereby probably influenced to return a guilty verdict because of the remarks. Finally, defense counsel did not timely object and thus waived the point for appeal purposes.

State v. Pouffer, 110 Ariz. 180, 516 P.2d 316 (1973).

FACTS

During the trial, Dr. Harris Murley testified for the defense. He testified that the appellant had been a patient at the Arizona State Hospital in 1966 where he was "diagnosed as suffering from chronic undifferentiated schizophrenia."

He testified the commitment was related to the death of appellant's brother for which the appellant was convicted.

PROSECUTOR

> Recurring undifferentiated schizophrenia, I think it's interesting that this occurs, reoccurs when he kills someone. It reoccurred when he killed his brother in '66, according to Dr. Murley. How many more times can society let it reoccur?

COURT

> In the case at hand the prosecutor was pointing out to the jury the suspicious nature of a defense which appeared only when it was needed by the appellant. Furthermore, the objection of defense counsel to the remark was sustained. The jury was instructed not to discuss or consider the possible punishment or the results of a finding of insanity and that it should not affect any decision as to the guilt or innocence of the defendant. The jury was also instructed that arguments of counsel are not evidence and that they were to disregard any comment which had no bias in evidence. Under these circumstances we cannot find that the remark was so inflammatory, offensive, and prejudicial as to require a reversal.

State v. Galioto, 126 Ariz. 188, 613 P.2d 852 (1980).

PROSECUTOR

"Arson costs <u>you</u> money."

COURT

The error was cured by an admonition.

State v. Carrillo, 128 Ariz. 468, 626 P.2d 1100 (1980).

PROSECUTOR

The prosecutor argued that the defendant tried to kill the victim.

COURT

A reasonable inference from the facts.

State v. Sullivan, 130 Ariz. 213, 635 P.2d 501 (1981).

PROSECUTOR

Send a message to pushers we will stamp out crime.

COURT

The argument was not improper.

State v. Nelson, 131 Ariz. 150, 639 P.2d 340 (1981).

PROSECUTOR

> These rape victims had a difficult time overcoming the results of the rapes; they testified that they underwent counseling; one victim shook on the stand, the other cried; the defendant put them through this twice; the defendant told them he was deciding if they would live or die; and asked the jurors to imagine what was in the victim's mind.

COURT

The comments were emotional but since they were founded on the facts, they were permissible.

State v. Agnew, 132 Ariz. 567, 647 P.2d 1165 (1982).

PROSECUTOR

"The fact that the defendant kept meticulous records does not mean that he had no criminal intent ... look at Joe Bonnano."

COURT

The comments were not intended to connect the defendant to Bonnano but rather to rebut the defendant's bookkeeping argument.

State v. McLaughlin, 133 Ariz. 458, 652 P.2d 531 (1982).

PROSECUTOR

The prosecutor advanced an argument which could be interpreted alternately as a prohibited reference to future conduct or as an argument relating to financial motive and lack of skill as a robber.

COURT

"We will interpret in favor of the prosecutor as the latter...." Court goes on to urge caution in using such arguments.

State v. Zaragoza, 135 Ariz. 63, 659 P.2d 22 (1983), cert. denied, 103 S.Ct. 3097.

PROSECUTOR

Not a tragic occurrence but rather a brutal and senseless killing.

COURT

Supported by facts.

E. Personal Opinion

It is improper and unethical for an attorney to state his personal opinion.

State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006).

State v. Lamar, 205 Ariz. 431, 72 P.3d 831 (2003).

State v. Garcia, 141 Ariz. 97, 685 P.2d 734 (1984) ("the crime I charged him with. . .").
State v. Salcido, 140 Ariz. 342, 681 P.2d 925 (App. Div. 2 1984)(vouching).
State v. Byrd, 109 Ariz. 10, 503 P.2d 958 (1972) (There is no question in my own mind.).
State v. Woodward, 21 Ariz.App. 133, 516 P. 2d 589 (App. Div. 1 1973) (the court would have thrown us out by now if this weren't a good case).
State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973) (I personally think . . .).

SUMMARIES

State v. Newell, 212 Ariz. 389, 132 P.3d 833 (2006).

PROSECUTOR

No matter what defense counsel tells you, we all know that DNA is ... the most powerful investigative tool in law enforcement at this time.

COURT

The prosecutor's statement about the superiority of DNA evidence improperly vouched for the State's evidence. No opinions had been elicited about the preeminence of DNA evidence. The prosecutor's comment here-that everyone knows that DNA evidence is the best investigative tool around-did improperly vouch for the strength of the State's evidence against Newell.

State v. Lamar, 205 Ariz. 431, 72 P.3d 831 (2003).

PROSECUTOR

Both witnesses said that when Macchirella used the phone [Lamar] told him that he was

stupid, and Macchirella's statement to that was, it made me feel smaller than I already feel. *Well, that sounds like a truthful statement,* and it kind of just tells you what kind of a person that Macchirella is. He's not the leader type. He sort of has an inferiority complex.

COURT

Comment was inappropriate but not fundamental error.

The comment does not say that Macchirella is generally a credible person whose entire testimony should be accepted. Rather, when considered in context, the prosecutor's comment states only that Macchirella's description of his reaction to Lamar's belittling comments "sounds like a truthful statement."

State v. Garcia, 141 Ariz. 97, 685 P.2d 734 (1984).

PROSECUTOR

In this case Judge Lines is going to give you a choice between two crimes. The crime that he's guilty of, the crime I charged him with, which is deadly or dangerous assault by a prisoner. Or a lesser included offense of the aggravated assault upon a prison guard.

COURT

Although the court agreed that the comment was error, because defense failed to object, appeal on the issue was waived. Further "[D]ue to the overwhelming evidence of guilt in this case," the court would not have reversed had timely objection been made.

State v. Salcido, 140 Ariz. 342, 681 P.2d 925 (App. Div. 2 1984).

PROSECUTOR

In addition, he made a big deal about where's the gas tank, where are the fingerprints? . . . Well, I went over with the agents at lunch time and saw the tank and Mr. McKinney, if he really wanted that tank here, he could have the, had had the tank here just as easily as I could have. the tank is [hard to get to]. . . and there is really no need to do so when the agents have, in fact, seen the tank and can testify where it is and its size. So, there's just no need to do it.

COURT

In the present case, whether the prosecutor's remarks are viewed as "testimony" from his personal knowledge or as vouching for the credibility of the state's witnesses, they were clearly improper and called to the jurors' attention facts which were not in evidence and which pertained to crucial matters for the jury's determination. The tenor of the argument implied the prosecutor's recognition that the testimony of his witnesses regarding the size of the gas tank might not be sufficient to undermine

the appellant's credibility in the eyes of the jury, and there is a strong probability that the subsequent verdict was influenced by his remarks. The trial court erred in refusing to grant appellant's motion for mistrial.

State v. Byrd, 109 Ariz. 10, 503 P.2d 958 (1972).

PROSECUTOR

This is probably one of the clearest cases I have ever taken to trial, and I think, at least in my own mind, there is not any question, any serious question that Mr. Byrd is guilty of the charge on this case.

COURT

[I]t is not only improper but also unethical for an attorney, in his closing argument, to express his personal belief in the defendant's guilt or innocence.

(Not reversible)

State v. Woodward, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973).

PROSECUTOR

You can bet the information they gave the judge was sufficient to get the judge to sign the warrant. If you think the jury hears all the evidence on this search warrant is [sic] a criminal case, you're crazy . . . If this was a mere presence case, it wouldn't have gotten this far. The Court would have thrown us out last week, but he hasn't.

COURT

The appellee argues that although these may have been improper arguments, they were invited comments encouraged by improper comments by defense counsel.

The fallacy of applying the rule in this case becomes apparent when the transcript reveals that all of the supposedly improper arguments of defense counsel were made by the attorney representing the co-defendant and not by the appellant's attorney.

The error may have warranted a mistrial, but the cumulative effect was highly prejudicial with a strong probability that the statements influenced the jury verdict.

Reversed and remanded.

State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

PROSECUTOR

STATE: * * * In making my closing argument, I would like to more or less take

things in the order in the way they came. Then I will run over them step by step and tell you why I personally think--

DEFENSE: Your Honor, we will object to the county attorney's personal opinion. THE

COURT: Sustained.

STATE: All right. And I don't think Mary - was up there lying to you. I don't think she ever lied to you.

DEFENSE: Your Honor, again, I will object to counsel presenting his personal opinion.

THE COURT: Sustained. Please refrain from doing so. STATE:

The State believes she was telling the truth.

DEFENSE: Your Honor, once again I will object. The jurors are to determine who was telling the truth, not myself or Mr. Zettler.

THE COURT: Just base your argument on the record, if you would, Mr. Zettler.

STATE: Now, the thing that the defendant tried to bring out in this case is that, well, these girls have a motive to come in here and to lie to you and that you shouldn't believe them because they have a motive. They don't like their stepfather. Well, I don't really blame them . . . .

STATE: It was also brought out, as to Wanda Jo, that Wanda Jo has had sexual intercourse with her boyfriend. . . . But really I don't know how we can worry about her having intercourse with her boyfriend when we consider especially the type of atmosphere, the type of environment she was brought up in.

Now, what about defendant's story? . . . What would be his motive for lying? What about his motive? Did you expect him to come in here and tell you, "Yes, I did these things?" You know what his motive is as well as I.

Maybe there was a lingering hate. I say there possibly was. I don't think I would think much of my stepfather either for some of the things that went on there. Mr. Douglas then starts talking about inconsistencies in the testimony, and first of all we have hundreds of pages of transcript where these girls were on the witness stand, where everything they said was written down, and we also have statements that they made at the police station where it was recorded, and he was given copies of this, and he had weeks and weeks to look this over, and then look at the girls.

He goes on to say, well, how come she never told the police back when she first went to them that she had sucked his penis? But at the preliminary hearing she testified to it and at the trial she testified to it. I could see why she probably didn't want to tell them, but when she was asked about it, when she was asked by Mr. Douglas she didn't hesitate to--she said, yes, I had done that, had done it on quite a few occasions.

Not reversible as objections were sustained and instructions given.

State v. Spain, 27 Ariz.App. 752, 558 P.2d 947 (App. Div. 2 1976).

PROSECUTOR

> I would like to start by saying first off we may not know for sure I may not know for sure what William Spain did in that residence. I know he did one of those things that happened there.

(After objection was sustained, the prosecutor argued.)

> I think the evidence shows you, ladies and gentlemen, he did one of those things that happened that night. . . .

(Emphasis added.)

COURT

> We believe that the prosecutor's statement made to the jury after the objection was sustained and the instructions of the court sufficiently brought home to the jury the proposition that the opinion of counsel was to be entirely disregarded by them.

State v. Filipov, 118 Ariz. 319, 576 P.2d 507 (1977).

PROSECUTOR

"He's guilty, guilty, guilty."

COURT

This was one of several improper arguments which cumulatively caused reversal.

State v. Islas, 119 Ariz. 559, 582 P.2d 649 (App. Div. 2 1978).

PROSECUTOR

"The State, ladies and gentlemen, would not waste its time bringing to trial a case in which the officer was ---". (objection was sustained)

COURT

Remark did not "warrant a reversal".

State v. Lozano, 121 Ariz. 99, 588 P.2d 841 (1978).

PROSECUTOR

(opening)

> I[f] the State is going to take the responsibility of charging an individual with a crime and imposing whatever sanctions we feel justified in imposing, then we had better be sure we have proven that individual guilty beyond a reasonable doubt.

COURT

> Any improper suggestion of the prosecutor's opinion as to appellant's guilt at that stage of the proceedings thus was mitigated by the court's advance admonition [that what the lawyers say is not evidence].

(opening statement)

State v. Smith, 126 Ariz. 534, 617 P.2d 42 (1980).

PROSECUTOR

The prosecutor called the defendant a liar and vouched for the credibility of state's witnesses.

COURT

The failure to object or ask for a mistrial constituted a waiver.

F. Commenting Upon the Defense Attorney's Reserving Opening Statement

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975).

PROSECUTOR

The prosecutor intimated that defense counsel reserved opening argument so he could hold back any mention of an intoxication defense and thereby leave open the option of arguing that the state had not linked defendant with the commission of the acts in question.

COURT

The trial court sustained objection and properly instructed the jury. Jury was probably not influenced.

G. Commenting Upon Suppressed Evidence

State v. Hauss, 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984) (reading from an excluded transcript).

State v. Williams, 120 Ariz. 600, 587 P.2d 1177 (1978)(response to defense comment on prosecutor's failure to use certain evidence).
State v. Montijo, 117 Ariz. 600, 574 P.2d 466 (1977) (raising victim's state of mind).

SUMMARIES

State v. Hauss, 142 Ariz. 159, 688 P.2d 1051 (App. Div. 2 1984).

The trial court properly found that although the prosecutor apparently read from an excluded transcript of a tape recording of statements by defendant, there were no grounds for granting defense's motion for mistrial. The statements had been introduced with the tape recordings and as far as the jury knew, the prosecutor was reading from her notes. The defense failed to show any prejudice resulted.

State v. Williams, 120 Ariz. 600, 587 P.2d 1177 (1978).

PROSECUTOR

> Now, Mr. Wolfram also talked about what I didn't do as the prosecutor during the case. He says during the examination of Mr. Young I didn't bring out the fact that Dorsey actually did the beating, as if I was trying to hide it. Mr. Wolfram knows very well why they weren't brought out. They weren't brought out because in the beginning of the case he made a motion to preclude them from being used at this time.

COURT

If error, it was harmless.

State v. Montijo, 117 Ariz. 600, 574 P.2d 466 (1977).

FACTS

The victim's state of mind was irrelevant and therefore the court had ruled that it was impermissible for the attorneys to raise the issue at trial.

PROSECUTOR

> I'll tell you--she said his hand was on the hammer. That hammer, if that hammer had gone like this, perhaps Melissa Rogers wouldn't be here to tell you what she told you. She never testified that she did not feel threatened. She testified she tried to reason.

TRIAL COURT

The trial court sustained the defense attorney's objection and told the jury that the victim's state of mind was "not a matter which is before you for your consideration one way or the other."

COURT

Though the statement was "clearly improper" any possible prejudice was removed by the trial court's admonition.

H. Intimating that Defense Counsel Fabricated a Defense

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998).

PROSECUTOR

> [Dr. Belan] knows the result he's looking for, and that's it. He knows the result he is looking for. Subject comes in with schizophrenic-potential schizophrenic diagnosis. He knows right there what he is looking for, and $950 later, yes, that's what he's got....
>
> ... He knows the result for he knows the result he wants...
>
> I mean he didn't see him, ladies and gentlemen, this defendant didn't walk off the street and say I am not feeling well, I have had this headache, I have got something wrong. I mean he comes to him in the most suspicious circumstances that you can ever have. He gets referred by his attorney. Just like he was in December of '91 for a psychiatric evaluation. Reportedly suffering from schizophrenia, and lo and behold, confirmed. Perfect.

COURT

> The State has no obligation to retain a mental health expert in a case such as this, but the State has an obligation to be honest with the facts. The prosecutor's reason for not retaining a mental health expert in this case was obvious; doing so would impair his trial strategy of ignoring the facts he did not like, relying on prejudice, and arguing that all mental health experts are fools or frauds who say whatever they are paid to say. That is a dishonest way to represent the State in any case, and it was especially dishonest in this case, where the evidence of mental illness was overwhelming, where the evidence of insanity was substantial, and where the State had no evidence that defense counsel or expert witnesses had fabricated an insanity defense.

State v. Lucas, 146 Ariz. 597, 708 P.2d 81 (1985), *overruled on other grounds by State v. Ives*, 187 Ariz. 102, 106, 927 P.2d 762, 766 (1996).

The closing argument of the prosecutor characterizing the defendant's testimony as a "snow job" did not draw the attention of the jury to matters not before it nor did it improperly influence the jury. The remarks were in refutation of the defense attorney's attacks on two state witnesses and well within the wide latitude allowed in argument.

State v. Travis, 26 Ariz.App. 24, 545 P.2d 986 (App. Div. 2 1976).

PROSECUTOR

> I can only go by . . . what the Defendant told us right here after it occurred, after he had a chance to consult with his attorney, before he got a chance to see the charge against him and charge up a defense in the case.

COURT

> We do not consider this comment to be 'invective so palpably improper that it is clearly injurious' and therefore find no abuse of discretion [in the trial court not granting a mistrial].

State v. Jahns, 133 Ariz. 562, 653 P.2d 19 (1982).

FACTS

Defense attorney drafted civil pleadings for the victim (father of the defendant), naming his client as the defendant (now he is the defendant in a civil action as well as a criminal action.) A consent judgment was then entered setting out a payment schedule. None of this was disclosed until the defense had the father/victim on cross.

DEFENSE ATTORNEY

The defense argued that since this was a "family offense" and since the matter had been settled civilly, the jury should acquit.

PROSECUTOR

The prosecutor questioned the ethics of the whole charade calling the defense attorney's efforts a "smoke screen" and a "sweetheart plea agreement."

COURT

Comments were supported by the evidence.

I. Misstatement of Facts

State v. Cannon, 148 Ariz. 72, 713 P.2d 273 (1985) (misreading of transcribed confession, omission of certain words not improper if no prejudice).

State v. Tiros, 143 Ariz. 196, 693 P.2d 333 (1985) (use of posters to illustrate law).

State v. Rendel, 19 Ariz.App. 554, 509 P.2d 247 (App. Div. 1 1973) (misstating what the defendant said).

State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973) (a misstatement of fact).

State v. Owens, 112 Ariz. 223, 540 P.2d 695 (1975) (misquoting a witness).

State v. Zumwalt, 7 Ariz.App. 348, 439 P.2d 511 (1968) (not including the defense attorneys in the category of "officer of the court.").

SUMMARIES

State v. Cannon, 148 Ariz. 72, 713 P.2d 273 (1985).

> Although is is not proper to misstate evidence, and, if done intentionally would be a serious breach of the prosecutor's duty, we fail to see how the omission of the words "by God" prejudiced appellant's case.
>
> The state's witness had read the defendant's confession erroneously and the error was echoed by the prosecutor in closing argument. Defense counsel had ample opportunity

to correct the error, but failed to do so. "Defense attorney's failure to do so only enhances our belief that the misstatement of the evidence was not prejudicial to appellant's fair trial.

State v. Tims, 143 Ariz. 196, 693 P.2d 333 (1985).

Use of a poster which correctly illustrates the elements of a crime and does not misstate the law in not improper in closing argument.

State v. Rendel, 19 Ariz.App. 554, 509 P.2d 247 (App. Div. 1 1973).

FACTS

The defendant was charged with possession of stolen motor vehicle.

PROSECUTOR

The prosecutor told the jury that the defendant said upon apprehension "that's the car I was driving to get that bill of sale for," a statement which the defendant never made.

COURT

The error, if any, was harmless; the prosecutor both prior to and subsequent to this remark correctly stated the evidence.

TECHNIQUE

Tell the jurors that what you say is not evidence and that if their collective recollection differs from that of the lawyers they should rely on their own collective memory.

State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

PROSECUTOR

PROSECUTOR: He goes on to say, well, how come she never told the police back when she first went to them that she had sucked his penis? But at the preliminary hearing she testified to it and at the trial she testified to it. I could see why she probably didn't want to tell them, but when she was asked about it, when she was asked by Mr. Douglas she didn't hesitate to--she said, yes, I had done that, had done it on quite a few occasions.

DEFENSE ATTORNEY: Excuse me. That's a misstatement of fact. She said, "No, I don't remember it."

PROSECUTOR: Another point that was brought up about Mary, she testified that the last time she had intercourse with her father was on May the 1 st, she thought, and then later on it was brought out, yes, there was a later date. It happened she thinks it was a couple days before she went to the police department.

DEFENSE ATTORNEY: Your Honor, that again is a misstatement of the fact. She testified during redirect examination by Mr. Zettler that she still thought the last time was May the 1st.

COURT

The prosecutor misstated certain testimony to his own advantage. Under the facts of this particular case, however, we do not feel that the closing argument was sufficiently prejudicial to warrant a reversal. The court did caution the jury not to treat comments of counsel as evidence and to disregard those comments which had no basis in the evidence; and every objection defense counsel interposed was, without exception, sustained.

State v. Owens, 112 Ariz. 223, 540 P.2d 695 (1975).

PROSECUTOR

The second thing that he said, and this is his opinion but you may consider his opinion because he is a medical doctor and an expert, you don't have to believe it but you may consider it. I said, "Doctor, is that cut, that wound that you saw, that laceration, consistent with having been incurred accidentally?" And he said his opinion, "No." I ask you to remember that about the doctor's testimony. It was a doctor who said it could not have been an accident.

COURT

It was uncontroverted that the physician never stated the cut could not have been the result of an accident. However, the defendant's failure to object during or just after the closing arguments constituted a waiver of any right to review on appeal. Furthermore, any prejudice resulting from the prosecutor's misstatement was diminished by the trial court's cautionary instruction to the jury that counsel's "arguments are not evidence" and that "[i]f any comment of counsel has no basis in the evidence, you are to disregard that comment."

State v. Zumwalt, 7 Ariz.App. 348, 439 P.2d 511 (1968).

PROSECUTOR

Your Honor, ladies and gentlemen: There is only one thing that I don't disagree with Mr. Miller on and that is the faith that I have in you good people as ladies and gentlemen of the jury, to see that justice is done.

That is my one visible duty; I am an officer of this Court, and he is not an officer of this Court. It is by absolute duty to divulge only the truth and to not, as Mr. Miller would have you insinuate, keep out things that I do not feel that you, as ladies and gentlemen of the jury, should not hear. That is in way of evidence and exhibits.

I believe, as he does, that this is a serious matter we are dealing with. Mr. Miller is not an officer of this Court. His duty isn't to the people; it is one thing and one thing

only, this man, and Mr. Hyder, to have you find their clients, the defendants, not guilty; not one other thing. His only moral obligation is to these two individuals and nobody else. Once he has done that, he has done the same thing that any defense counsel will do, and that is to find his clients, for you the jury, to find his clients not guilty.

At the close of the County Attorney's argument the defendant moved as follows and the court ruled:

MR. MILLER: If the Court please, I would like the record to show an objection by both Mr. Hyder and myself with respect to Mr. Florence's opening remark when he stated that he was an officer of the Court and neither Mr. Hyder nor myself were; and Mr. Hyder and myself are officers of this Court.

THE COURT: The jury will be instructed to disregard that statement of Mr. Florence concerning counsel being officers of the Court.

COURT

We do not feel that these remarks by the County Attorney ... were proper. Both the County Attorney and defense counsel were and are officers of the court.

(no prejudice)

J. Discussing the Law

State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005)(jury instructions that the lawyer's statements are not evidence cured the prosecutor's misstatement of the law).

State v. Tims, 143 Ariz. 196, 693 P.2d 333 (1985) (use of posters).

State v. White, 102 Ariz. 162, 426 P.2d 796 (1967) ("failure to prevent robbery is to encourage it. . .").

State v. Vanderlinden, 111 Ariz. 378, 530 P.2d 1107 (1967) (failure of the trial court to instruct on crime as indicated in response to objection).

State v. Juarez, 111 Ariz. 119, 524 P.2d 155 (1974) (defendant wouldn't be here if the court didn't believe he had violated the law).

State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977) (reference to what might happen to victims as a result of testifying) (Defendant would have to have been-so intoxicated).

State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974) (incorrect statement of the law).

State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977)(misstatement of the law).

SUMMARIES

State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2005).

Prosecutor misstated the law of pecuniary gain. Because the court properly instructed the jury on the law and that the prosecutor's statements were not evidence, however, there was no fundamental error.

State v. Tims, 143 Ariz. 196, 693 P.2d 333 (1985).

Use of a poster which correctly illustrates the elements of a crime and does not misstate the law in not improper in closing argument.

State v. White, 102 Ariz. 162, 426 P.2d 796 (1967).

PROSECUTOR

The prosecutor implied that failure to prevent a robbery is to encourage it.

COURT

> The prosecutor's statement was in rebuttal to the theory of appellant's defense. As such it was proper argument. The court's final instructions to the jury gave a complete and adequate statement on the law of aiding and abetting, as well as an instruction that their decision was to be governed solely from the evidence.

State v. Vanderlinden, 111 Ariz. 378, 530 P.2d 1107 (1975).

FACTS

The defendant was charged with embezzlement over $100. The defendant had been "entrusted" with a $22.00 check which the defendant changed to $22,000.

PROSECUTOR

> Whether you take his [Vanderlinden's] statements [to third parties] . . . or whether you take the theory of the State that that check for $22 was not completely made out by [sic] was raised to $22,000 by inserting a comma and adding the figure doesn't matter--

The defense counsel objected stating:

> Your Honor, I hate to interrupt opposing counsel, but if counsel is arguing the crime of forgery, which has not been introduced into this case, I would ask that the jury be given an instruction that they cannot find my client guilty of embezzlement; if he did, in fact, alter the check, it was forgery.

To which objection the trial court replied, "I will instruct the jury on the law that governs the case."

COURT

Unfortunately, the trial court did not instruct the jury on the law governing the case. After instructing the jury, the court inquired in open court whether there were additions to the instructions desired by counsel. The defense counsel stated:

> Your Honor, as I so rudely interrupted counsel in his closing argument when he made reference to altering a check, there is no evidence in this case that the check was altered. If the check was, in fact, altered, it constitutes a separate and distinct crime from that with which the defendant has been charged.

I would move the Court at this time to instruct the jury that if they find the defendant did, in fact, alter the check, that they cannot find him guilty of the crime of embezzlement.

The Court's action was: "Motion denied."

Since the error was called to the trial court's attention with sufficient clarity to establish the point, the ruling of the trial court allowing the erroneous statements of the prosecutor to stand was reversible error.

State v. Juarez, 111 Ariz. 119, 524 P.2d 155 (1974).

PROSECUTOR

I'll submit to you that His Honor would never allow you to deliberate on this case were it not the law that Mr. Juarez could be included within the legal definition of sale to be a seller.

As a legal matter, if Mr. Juarez was not a seller, as a matter of law, this would not be allowed to go to you as a jury.

COURT

Highly improper, but no objection so no reversal.

State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977).

PROSECUTOR

It's easy to see little children come in and testify. Easy to think about what that might . . . do to them for the rest of their lives.

Trial Court (corrective instruction)

As to what it may do to them for the rest of their lives, the jury is not concerned with that.

COURT

No abuse of discretion in denying motion for new trial.

State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977).

PROSECUTOR

I'll draw an analogy. You would have to be so intoxicated, ladies and gentlemen, that when you pick up a glass to have a drink you didn't intend to pick that glass up.

(Objection overruled)

> For him to be so intoxicated that he did not deliberate, that he did not have the willfullness [sic], malice or premeditation is the same as somebody getting in a car and not intending to drive the car. To be so intoxicated it would lower the crime, it would be for him not to know where he was, where he was going or what he had done.

(Objection overruled)

COURT

Defense counsel's objections were erroneously overruled but correct jury instructions corrected so jury probably not influenced.

State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974).

PROSECUTOR

The prosecutor in his closing argument to the jury made the statement that under the facts of the case, the crime that was involved could not be manslaughter because there was no evidence of provocation on the part of the victim and without provocation there cannot be manslaughter.

COURT

Although incorrect statement of law and trial court refused to give cautionary instruction, the trial court did properly instruct as to the effect of voluntary intoxication, therefore the jury was not misled.

State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977).

PROSECUTOR

The prosecutor misstated the law of homicide but also told the jury to follow the judge's instruction on the law rather than the prosecutor's interpretation of the law.

COURT

The prosecutor's "cautionary" statement and the court's proper instruction saved case from reversal.

K. Commenting Upon Suppressed Evidence and Objections

It is improper to comment upon legal issues which the jury would not be justified in considering in determining their verdict.

1. Suppression Issues

State v. Houlf, 27 Ariz.App. 633, 557 P.2d 565 (App. Div. 2 1976)(discussing probable cause).

State v. Woodward, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973)(implied judge looked with favor on search warrant).

2 Objections

State v. Islas, 119 Ariz. 559, 582 P.2d 649 (App. Div. 2 1978) (comment on objection by defendant).
State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975) (commenting on reasons for sustaining defense objection).
State v. Sustaita, 119 Ariz. 583, 583 P.2d 239 (1978) (implying the defense attorneys were rude).

SUMMARIES

State v. Islas, 119 Ariz. 559, 582 P.2d 649 (App. Div. 2 1978).

PROSECUTOR

> I'm aghast at the defense for trying, objecting to the fact that agent Parella is not here, when he objected on redirect examination--

(Objection to this argument was sustained.)

COURT

Improper, but objection sustained and jury that likely influenced.

State v. Scott, 24 Ariz.App. 203, 537 P.2d 40 (App. Div. 2 1975).

PROSECUTOR

The prosecutor told the jury that objections of defense counsel were sustained because defendant's sanity was not in issue.

COURT

The trial court sustained objection, indicated disapproval, and gave appropriate cautionary instruction, all of which prevented prejudice.

State v. Sustaita, 119 Ariz. 583 P.2d 239 (1978).

FACTS

The prosecutor did not object during the defendant's closing. Immediately upon the beginning of rebuttal the defense attorney objected.

PROSECUTOR

The prosecutor then commented that he (the prosecutor) "wanted to wait until after they were through speaking before commenting upon what they said" (implying the defense attorneys were rude).

COURT

"We do not believe the remarks are in the least bit prejudicial."

L. Commenting Upon Failure of Court to Direct Verdict

State v. Woodward, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973).

PROSECUTOR

> If this was a mere presence case, it wouldn't have got this far. The Court would have thrown us out last week but he hasn't.

COURT

> [T]he prosecutor commented upon matters not in evidence and in this most prejudicial statement indicated the judge would have dismissed the case if he didn't believe the defendants were guilty.

This plus other improper statements, "was highly prejudicial with a strong probability that the statements influenced the jury verdict." (Reversed)

State v. Jones, 123 Ariz. 373, 599 P.2d 826 (App. Div. 2 1979).

PROSECUTOR

> The court has dismissed a count in this case, the one as to Laura. The state did not prove to you that there was penetration of Laura; and that count was dismissed.

COURT

> Appellant contends that the inference from this statement is that the trial court believed there to be merit to all the rest of the counts. We do not agree. Furthermore, the trial court instructed the jury that it was not to consider why the count as to Laura had been dismissed.

M. Commenting Upon Possible Punishment

It is improper but not usually fundamental error to comment upon the possible punishment a defendant will receive. *State v. Sayre,* 108 Ariz. 14, 492 P.2d 393 (1972).

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002) (suggesting defendant would benefit from conviction).

State v. Jones, 197 Ariz. 290, 4 P.3d 345 (2000) (passing reference to death penalty).
State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983) (if witness had an incentive to lie, so did defendant).
State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969) (don't give the defendant a chance to kill again).
State v. Karstetter, 110 Ariz. 539, 521 P.2d 626 (1974) (don't release his back into society).

SUMMARIES

State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).

FACTS

Defendant objected to state's closing, claiming that the prosecutor improperly argued punishment by suggesting that conviction would benefit the defendants. Defendant argued that this implies that, if convicted, defendants would be provided with counseling.

PROSECUTOR

> And that is what your job is to do. Your job is to say, no, no, no, no longer do we believe that. You are personally responsible for what it is you did, and now it's time to answer to that.
>
> Who knows what the result of that might be? Who knows? Any one of these people may take that to heart. May learn that lesson. May come to the conclusion that, you know what, that jury, that prosecutor, those cops, they were right. Where I was going was the wrong way. And I might be dead, but for them.

COURT

> We reject Defendant's interpretation of the State's remarks as being clear comments on punishment, in part because we cannot ascribe to them the meaning Defendant suggests. The prosecutor's statements did not suggest that conviction would result in any particular form of punishment.

State v. Jones, 197 Ariz. 290, 4 P.3d 345 (2000).

PROSECUTOR

> This is a first-degree murder case and one of the possible sentences-it's up to the Judge, of course-is the death penalty. The State has to prove a case beyond a reasonable doubt, and that burden, beyond a reasonable doubt, is exactly the same in this case as it is in a burglary case or a drunk driving case. The burden does not get higher because of the nature of the charges.

COURT

> [T]he reference to the death penalty does not call attention to a fact that the jurors would not be justified in considering during their deliberations. In fact, the prosecutor stated that the possibility of the death penalty should *not* influence a determination of reasonable doubt. Second, the probability that the statement improperly influenced the jurors was very low. The jurors had been told from the very beginning of the trial, through both direct statements and voir dire questions, that the prosecution was seeking the death penalty. The prosecutor did not commit misconduct by making a brief

reference to the death penalty in the context of discussing the burden of proof.

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (1983).

PROSECUTOR

Mr. Lamas perhaps at some point has a ten-year prison sentence hanging over his head. It is suggested that this provided the incentive for him to come in here and lie. What do you thing is hanging over the defendant's head? We're talking about somebody who, if he's convicted here, is--

Your Honor, I object to this line of argument.

TRIAL COURT

"Sustained."

COURT

It is improper for the jury to consider defendant's possible punishment in reaching its verdict. (citations omitted) In the case at bar, the prosecutor did not indicate the sentence defendant would receive if convicted. While the prosecutor's reference to the informant's possible punishment for other offenses may have indicated that defendant would receive a like sentence if convicted of the offenses charged, we find that the error was cured by the trial court's instruction to the jury. . . and the court's action of promptly sustaining defense counsel's objection to the prosecutor's remarks.

State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969).

DIRECT EXAMINATION

At the trial, over timely objection the prosecution was permitted to ask the following questions of an expert medical witness to which the following answers were given:

Q. If he were in fact sent to the state hospital, the state hospital at any time within their discretion could release him; is that not correct?

A. That's right.

Q And in your experience you have seen cases where persons have been found not guilty by reason of insanity and have been back on the streets soon thereafter; haven't you?

A. That's right.

PROSECUTOR

He is essentially dangerous to other people; he is very dangerous to himself. We can't afford—society can't afford to have Mr. Makal take the life of any other innocent victims. Society can't afford that.

Those that have consciences can't afford that, ladies and gentlemen. Don't arrive at a verdict which will give Mr. Makal the opportunity to kill again.

COURT

Misconduct and evidence that Makal was insane was "overwhelming" so comments were not harmless - reversed.

State v. Karstetter, 110 Ariz. 539, 521 P.2d 626 (1974).

PROSECUTOR (Opening Argument)

You are going to be instructed . . . that if you find the defendant not guilty by reason of insanity, it doesn't mean freedom for him. Dr. Enos did not recommend in his report that this guy go to a mental institution. Dr. Enos did not recommend in his report that he undergo psychiatric study for prolonged periods of time in some type of an institution. Doesn't that tell you anything about the sham aspect of this defense? When I asked him about it he said, "Well, yes, I think he should have psychiatric care." Well, why didn't you recommend it, doctor? "Because he's not insane."

DEFENSE

You do not take a person who has committed this offense ... and you release him back into society. There is no argument about that. Yet [the prosecutor] wants to harp on it.

The last instruction is the most important and it is probably a question that you have carried with you from the beginning of this trial to the end. It's something that until very recently in this state we had no answer to, because the prosecutor has told you that you are going to let this man go back on the streets... If I were sitting in your place, and I thought it was a question of convicting him or finding him not guilty by reason of insanity and putting him back on the streets, I would probably convict him because we can't tolerate that. But our law has changed... If the defendant is found not guilty by reason of insanity, then a second hearing shall be held before this jury to determine whether the defendant's mental condition justifies commitment to an appropriate mental institution... A verdict of not guilty by reason of insanity does not mean in and of itself freedom from punishment... This means not like you have read in the newspapers where one day a person is in the mental institution and the next day some crazy director of the mental institution releases him... This defendant, if you commit him to a mental institution, cannot be released until twelve people like yourselves review the entire case and decide whether he is dangerous or not.

PROSECUTOR (Rebuttal)

Yes, it is true that if an individual beats a murder case by a verdict returned of not guilty by reason of insanity, it is true that if he is committed, then the only way he can get out is having it submitted to a jury ... that he is now sane and no longer dangerous to society. But he has to be committed first, and that's why it's crucial that Dr. Enos didn't put in his report that this guy should be committed. Dr. Fuchler didn't put in his report or didn't state the individual should be committed... Why? Because they both knew full well that ... he is not insane.

At this point, defense counsel objected that the prosecutor was misleading the jury. There was some argument, and the judge read pas of A.R.S. § 13-1621.01 to the jury, after which the prosecutor continued his argument, as follows:

> That means if you find him not guilty by reason of insanity and say he should be sent to a mental institution . . . what will happen is that he will be examined . . . the psychiatrist will look at him and say he's sane . . . this guy may have a reading disability but we can't hold him here . . . because he is not insane as a matter of law, and he does go free.

COURT

> No objection was made to those statements. The court instructed the jury that if it found him not guilty by reason of insanity, a second hearing would be held before the same jury to determine whether defendant's condition justified commitment to a mental institution, and that a verdict of not guilty by reason of insanity "does not mean that the defendant, if his present condition justifies commitment... will be confined to a hospital for the mentally ill to be released only after a jury trial....
>
> Defense counsel apparently was satisfied with the instructions and made no objection to them. In our opinion, no reversible error was committed in the prosecution's closing or rebuttal arguments.

N. Questioning Integrity/Competence of Defense Experts

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184 (1998).

PROSECUTOR

> [Defense counsel] wants you to make your decision based on what Dr. Potts has to say and ignore the evidence in this case. He wants you to forego and to give up and to relinquish ... [your right] to pass judgment, for you to act as a member of this community and to decide, ladies and gentlemen.
>
> Not Dr. Potts, not some $4,000 or $6,000 hired doctor who wants to come in here.... I mean you stand, ladies and gentlemen, between this great power of psychiatry and truth and justice here. I mean, ladies and gentlemen, Dr. Potts, Dr. Belan, they could no more tell you what was going on inside of that man's mind than they can tell you whether or not he was abducted by a UFO....

COURT

Improper. (Attorney was later sanctioned and suspended.)

State v. Bailey, 132 Ariz. 472, 647 P.2d 170 (1982).

The court held it was reversible error to call the defense pathologist "marginally competent." (Presenting some evidence might have saved the day.)

O. Final Argument Beyond Scope of Defense Argument

It is improper in the state's final argument to go beyond scope of the defense's argument. *State v. Adams,* 1 Ariz.App. 153, 400 P.2d 360 (1965). Of course the line between what is and what is not "rebuttal" is difficult at best to draw. Where the defendant is not prejudiced by the prosecutor's going beyond the proper scope of rebuttal, *State v. Goldston,* 133 Ariz. 520, 652 P.2d 1043 (1982), the court will not reverse.

P. Inferences of Guilt From the Ethical Conduct of Defense Counsel

State v. Long, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986).

In this case, the defense attorney refused to call a certain witness and defendant asked to represent himself and call the witness. The defendant stated that defense attorney refused to call the witness because of his belief the witness would perjure herself. The prosecutor stated in closing argument that defense counsel's behavior was an indication of the credibility of the witness. The court found this to be prejudicial error. "We find this effort to make affirmative evidence of guilt out of defense counsel's ethical behavior to be prejudicial error. The conviction [is] reversed. . .

V. EFFECTS OF IMPROPER ARGUMENT

Once it has been determined that comments during argument were improper, the trial court must determine whether to declare a mistrial. Later the appeal courts must decide whether the argument constitutes reversible error. In arriving at this decision, the courts must first determine whether the argument constituted "fundamental error." If so, mistrial or reversal is mandatory. If not, the court must determine whether a timely objection was posed and whether proper admonition or jury instruction cured the error.

A. Objection

It is a well-settled principle of law that unless the argument constituted fundamental error, opposing counsel must timely object to the comment or waive his right to complain.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004).
State v. Prince, 204 Ariz. 156, 61 P.3d 450 (2003).
State v. Siddle, 202 Ariz. 512, 47 P.3d 1150 (App. Div. 2 2002).
State v. Blackman, 201 Ariz. 527, 38 P.3d 1192 (App. Div. 1 2002).
State v. Guillory, 199 Ariz. 462, 18 P.3d 1261 (App. Div. 2 2001).
State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997).
State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (App. Div. 1 1996).
State v. Lee, 185 Ariz. 549, 917 P.2d 692 (1996).
State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996).
State v. Murray, 184 Ariz. 9, 906 P.2d 542 (1995).
State v. Church, 175 Ariz. 104, 854 P.2d 137 (App. Div. 1 1993).
State v. Hill, 174 Ariz. 313, 848 P.2d 1375 (1993).
State v. Johnson, 173 Ariz. 274, 842 P.2d 1287 (1992).

State v. Garcia, 173 Ariz. 198, 840 P.2d 1063 (App. Div. 2 1992).
State v. Cook, 170 Ariz. 40, 821 P.2d 731 (1991).
State v. Hernandez, 170 Ariz. 301, 823 P.2d 1309 (1991).
State v. Valdez, 167 Ariz. 328, 806 P.2d 1376 (1991).
State v. Comer, 165 Ariz. 413, 799 P.2d 333 (1990).

1. Objection at Earliest Opportunity

"Counsel must object to improper argument at the earliest opportunity to allow the trial court to correct the error; failure to do so waives the error." *State v. Contreras*, 122 Ariz. 478, 595 P.2d 1023 (App. Div. 2 1979); *accord State v. Lindeken*, 165 Ariz. 403, 407, 799 P.2d 23, 27 (App. Div. 1 1990). However, under some circumstances (such as the trial court's refusing to allow interruptions in final arguments), claimed errors occurring during argument may be preserved by an objection at the close of argument. *State v. Johnson*, 122 Ariz. 260, 594 P.2d 514 (1979).

2. Defense Dilemma

As can be seen, improper argument by the prosecutor places the defense counsel in a precarious position. If he fails to object, he waives the error. If he does object, he not only calls attention to the prosecutor's argument, but also is the catalyst in the court's curing the error. See, for example, *State v. Adair*, 106 Ariz. 58, 470 P.2d 671 (1970), in which the prosecutor argued the following:

Would it stand to reason the defense attorney would be indicative of a double-edged razor blade and look for both sides of evidence to present to the jury that his defendant was innocent or guilty? In other words, to show guilt as well as innocence? No, no, oh no. He shows one side. His job is to get his client off the rap, but the County Attorney has a burden to the people, not only to you the jury and to the public, but also to the defendant, because if any evidence turns up it must be presented in the courtroom to you to indicate, as well as guilt, the innocence of the defendant.

On review, the court noted that "these statements cannot constitute a ground for appeal because any such ground has been waived by failure to make a timely objection. We note also that even though no objection was made, the jury was instructed that arguments of counsel are not evidence and further that 'if any comment of counsel has no basis in the evidence, you are to disregard that comment.' We believe that such instruction may well have corrected any prejudice which the prosecutor's statements may have created."

In *State v. Sarullo*, 219 Ariz. 431, 199 P.3d 686 (App. Div. 2 2008), improper argument was made, but the defense objection was sustained. This cured the error.

B. Instruction by Trial Court

"[I]t is the rare, rather than the common, situation where an inadmissible statement could not be cured by a proper limiting instruction." *State v. Miguel*, 15 Ariz.App. 17, 485 P.2d 841 (App. Div. 1 1971). Such instructions are of two types: (1) standard instructions given in nearly all cases, such as "consider only the evidence"; and (2) cautionary instructions to disregard a specific portion of an argument. As a general rule, jurors are assumed to follow such instructions and prevent reversible error.

State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977), is a good example of both types of instruction. The prosecutor misstated the law of intoxication and intent in his closing. In response to a defense objection, the trial court told the jury that it would give instructions "on the law and you will not find in the instructions anything like what counsel is arguing." Thereafter, the court did properly instruct the jury as to the law. On appeal, it was held that there was no abuse of discretion in refusing to grant a new trial in light of the court's corrective remarks and instructions.

1. Standard Instructions

State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009) (prejudice from victim-impact statements).

State v. Pandeli, 215 Ariz. 514, 161 P.3d 557 (2007) (jury is to give effect to all evidence).

State v. Morris, 215 Ariz. 324, 160 P.3d 203 (2007) (lawyer's arguments not evidence).

State v. Anderson, 210 Ariz. 327, 111 P.3d 369 (2006) (misstatement of law).

State v. Newell, 212 Ariz. 324, 160 P.3d 203 (2007) (jury must consider all evidence).

State v. Jeffrey, 203 Ariz. 111, 50 P.3d 861 (2002).

State v. Anaya, 170 Ariz. 436, 825 P.2d 961 (App. Div. 2 1991) (misstatement of law).

State v. Jerdee, 154 Ariz. 414, 743 P.2d 10 (App. Div. 1 1987).

State v. Lozano, 121 Ariz. 99, 588 P.2d 841 (1978) (personal opinion).
State v. Purcell, 117 Ariz. 305, 572 P.2d 439 (1977) (misstatement of the law).
State v. Means, 115 Ariz. 502, 566 P.2d 303 (1977) (misstatement of the law).
State v. Price, 111 Ariz. 197, 526 P.2d 736 (1974).
State v. Jaramillo, 110 Ariz. 481, 520 P.2d 1105 (1974)(reference to department reports not in evidence).
State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1 974)(proper instruction on law cured argument "it couldn't be manslaughter").

2. Specific Cautionary Instructions

State v. Cropper, 223 Ariz. 522, 225 P.3d 519 (2010).

State v. Moody, 208 Ariz. 424, 94 P.3d 1119 (2004) (impermissible statement regarding Defendant's guilt).

State v. Dann, 205 Ariz. 557, 74 P.3d 231 (2003) (improper comment on evidence).

State v. Lamar, 205 Ariz. 431, 72 P.3d 831 (2003) (improper hearsay testimony).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353 (2002) (improper opinion testimony).

State v. Jones, 197 Ariz. 290, 4 P.3d 345 (2000) (testimony concerning prior bad acts).

State v. Riggs, 189 Ariz. 327, 942 P.2d 1159 (1997) (comment regarding Defendant's refusal to be interviewed).

State v. Kemp, 185 Ariz. 52, 912 P.2d 1281 (1996) (question regarding Defendant's silence).

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (App. Div. 1 1983).

State v. Montijo, 117 Ariz. 600, 574 P.2d 466 (1977).

State v. Puffer, 110 Ariz. 180, 516 P.2d 316 (1973).

State v. Miranda, 104 Ariz. 174, 450 P.2d 364 (1969)("aborted" improper arguments attempted by prosecutor).

C. Admonitions by the Prosecutor

All improper argument by the prosecutor is rooted in the prosecutor's arguing outside of the evidence. A prosecutor who advises the jurors in his closing argument that what he says is not evidence not only shows the jury that he is fair, but also helps to keep his own record "clean".

1. Although the prosecutor misstated the law on homicide, he had previously advised the jury to "follow the judge's instructions on the law" rather than the prosecutor's interpretation of the law. The court properly instructed on the law of homicide. *State v. Purcell*, 117 Ariz. 305, 572 P.2d 439 (1977).

2. In *State v. Allen*, 1 Ariz.App. 161, 400 P.2d 589 (1965), the prosecutor called the defendant "an accomplished thief". The Court of Appeals found that the comment did not constitute prejudicial error because (for one thing) "the jury was specifically told by the prosecuting attorney at the start of his argument that what he said 'is not evidence, it is argument. It is the evidence as I see it and as I construe it.'"

3. The prosecutor arguably referred to matters not in evidence. However, prior to these comments he was careful to point out:

> What I say to you during this argument, during my talk with you is not evidence in this matter. The only evidence that you have heard is what you have heard from the witness stand and the exhibits that are in evidence, and if I have stated some fact and you heard it differently or you have heard it differently from a witness, please disregard my statement of the fact and follow what you heard from the witness stand; and if I misstate some point of law to you during the course of my argument, please disregard my statement of the law also and follow it as you hear it from the Court.

Also the trial court instructed the jury as follows:

> While arguments are not evidence, counsel may argue reasonable inferences from the evidence. If any comment of counsel has no basis in the evidence you are to disregard that comment.

COURT

"(N)o error".

State v. Price, 111 Ariz. 197, 526 P.2d 736 (1974).

D. Types of Error

1. Invited Error

Remarks of the prosecutor, even if improper, which are invited or occasioned by defendant's counsel or which are in reply to defense counsel's statements, as a general rule, are not grounds for reversal unless they go beyond a pertinent reply. Ordinarily, such remarks are viewed as error, but the appellate courts are reluctant to reverse such invited errors. In at least one case, *State v. Arredondo,* 111 Ariz. 141, 526 P.2d 163 (1974), even fundamental error was not reversed because it was invited by defense counsel's argument.

State v. Trostle, 191 Ariz. 4, 951 P.2d 869 (1997) (reference to victim's family and failure to call an expert witness).

State v. Crumley, 128 Ariz. 302, 625 P.2d 891 (1981).

State v. Woods, 141 Ariz. 446, 687 P.2d 1201 (1984) ("If you want to know why I offered the defendant this plea agreement, talk to me after court.").

State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1984) (comments on the defense attorney's job).

State v. Huffman, 137 Ariz. 300, 670 P.2d 405 (App. Div. 2 1983) (comments by defense on knowledge of the defendant).

State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974) (comment on defendant's failure to take the stand in reply to comments by the defense).

State v. White, 115 Ariz. 199, 564 P.2d 888 (1977) (defense counsel invited prosecutor's improper comment on credibility -- not reversible).

State v. Ramirez, 111 Ariz. 498, 533 P.2d 665 (1975) (response to defense counsel's opening statements -- not reversible).

State v. Jaramillo, 110 Ariz. 481, 520 P.2d 1105 (1974) (defense interjected punishment -- prosecutor's remarks about probation were invited -- not reversible).

State v. Smith, 101 Ariz. 214, 418 P.2d 370 (1966) (comments on defendant's failure to take the stand went beyond pertinent reply -- reversible error).

State v. Cortez, 101 Ariz. 214, 418 P.2d 370 (1966) (response to defense counsel's argument about "weak case" went too far -- reversible error).

State v. Salazaar, 27 Ariz.App. 620, 557 P.2d 552 (App. Div. 2 1976) (response to defense's characterization of prosecutor's theory -- not reversible).

State v. Parker, 22 Ariz.App. 111, 524 P.2d 506 (App. Div. 1 1974) (explaining absence of a witness -- not reversible).

SUMMARIES

State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974).

DEFENSE

> Your Honor, at this time I advise the Court that I advised my client not to take the stand and that at this time we would rest.
>
> With regard to the privilege against self- incrimination, Mr. Arredondo did not get on the stand and you will be instructed by His Honor at the close of the case that you cannot take that into consideration against him in your jury deliberations.

During his argument to the jury the defense counsel had the defendant stand before them so that the jury could appreciate the relative differences in size between the defendant and the victim. The record reflects:

> The victim, statistical-wise, was 6'2", 187 pounds, which means he was about my height and about seven pounds heavier than I am. . . .
>
> John, would you come forward.
>
> ...
>
> Now, this is John. He is a human being. He is flesh and blood, and you see his size. He is--I won't -say he is small, but that is his relative size in relation to me.

The defense counsel also argued:

> There was no money found on the defendant, and, this is important, there were no eyewitnesses to the shooting. No eyewitnesses to the robbery–alleged robbery–or rummaging through the wallet.

PROSECUTOR

> Defense counsel said there was no eyewitnesses to the shooting. That is not true. There was one witness, right there (indicating). And you know what, the best he could do-- Mr. Cronin called him up here, had him stand in front of you and you know something? That man didn't even have the guts to look you people square in the eye. He looked down the whole time and kept his eyes down. Isn't that right?

COURT

> The ... comment of the prosecutor was a comment on the failure of the defendant to take the stand. Both the Federal and State Constitutions protect the defendant from being compelled to give evidence against himself, and by statute, A.R.S. § 13-163, the refusal of the defendant to be a witness may not be used against him in trial. Normally such a comment constitutes fundamental error.

However,

> ...the remarks of the prosecutor did not go beyond a pertinent reply and were not prejudicial. The remarks were invited and occasioned by the statements of defense counsel, hence they are not grounds for reversal.

2. Fundamental Error

Fundamental error is committed when a defendant's Constitutional Rights are violated by the argument. This is usually in the context of referring to defendant's failure to take the stand. No objection at trial court level is necessary to preserve fundamental error. As indicated by *State v. Arredondo*, 111 Ariz. 141, 526 P.2d 163 (1974), though, even fundamental error may be rendered non-reversible if invited by defense counsel's argument. And even fundamental error is sometimes viewed as harmless error. *State v. Scarborough*, 110 Ariz. 1, 514 P.2d 997 (1973); *State v. Shing*, 109 Ariz. 361, 509 P.2d 698 (1973); see also *State v. Rutledge*, 205 Ariz. 7, 66 P.3d 50 (2003).

State v. Long, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986) (using the ethical actions of defense counsel as inferences of guilt is prejudicial error).

State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1 976)(comment on the fact that defendant did not take the stand).

State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1973)(comment on defendant's failure to take the stand).
State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966)(invited error does not apply).

SUMMARIES

State v. Long, 148 Ariz. 295, 714 P.2d 465 (App. Div. 2 1986).

In this case, the defense attorney refused to call a certain witness and defendant asked to represent himself and call the witness. The defendant stated that defense attorney refused to call the witness because of his belief the witness would perjure herself. The prosecutor stated in closing argument that defense counsel's behavior was an indication of the credibility of the witness. The court found this to be prejudicial error.

"We find this effort to make affirmative evidence of guilt out of defense counsel's ethical behavior to be prejudicial error. The conviction [is] reversed. . . ."

State v. Decello, 113 Ariz. 255, 550 P.2d 633 (1976).

PROSECUTOR

> The evidence in this case, that is the photographs that were entered into evidence, and the testimony from witnesses, that came up here and testified is undisputed and uncontradicted testimony.
>
> No one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses, by Joe Speed, by Pete Hansen, and by Jeannie Johnston, and the testimony read to you by Esther McCluer, and the testimony of Detective Ysasi and Nickolan.
>
> MR. GERHARDT: Your Honor, if we may note another objection?
>
> THE COURT: Yes, indeed.

(Emphasis supplied)

COURT

> The comment "no one, no one, no one got up on this stand and testified to you contrary to what was testified to you by the witnesses" was certainly calculated to point out to the jury that the defendant had not taken the stand and testified and was, we believe, fundamental error.

(Reversed)

State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1973).

PROSECUTOR

So, if we are to presume--if we are to presume Dr. Tuchler is to be the key in this case and he is going to extend--he's going to extend and explain away the following of Jeannie's failure that she did not have to explain away, or that she did not explain away off of that witness stand, well, let's examine Dr. Tuchler more closely. Let's examine him more closely.

COURT

This is a direct comment on the defendant's failure to take the witness stand. Whether this was intentional or accidental is of no moment. The defense motion for a mistrial should not have been denied. In a case where the defendant's rights against self-incrimination are violated it is fundamental error.

State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966).

PROSECUTOR

Counsel talked about the defendant not taking the stand. He gave several reasons for which the defendant did not have to take the stand. Since he has opened the door in that area, I would like to say that one of the reasons the defendant does not have to take the stand is because when he does take the stand, he is submitted to cross-examination; the state would be allowed to go into any aspect of the defendant's life which might have a bearing on the case and he would be asked about anything that he may have done in the past, any trouble he had been in, any conviction that he may have had, and certainly if he had been in trouble before, he wouldn't want to take the stand.

COURT

The present case is a clearer instance where the invited error doctrine does not apply. The remarks of the prosecuting attorney went far beyond the comments of the defense attorney even to the extent of saying that if the defendant took the stand "he would be asked about anything that he may have done in the past". In *Cortez, supra*, the remarks were deemed reversible error because both improper and prejudicial. In the present instance there is the added factor that the prosecutor's remarks went directly to a specific constitutional guarantee.

This latter right has been considered to be of such importance and magnitude that where it has been breached no resulting prejudice need be shown in order to warrant a new trial.

3. Harmless Error

State v. Vild, 155 Ariz. 374, 746 P.2d 1304 (App. Div. 1 1987).

PROSECUTOR

Imagine at the Pointe [sic] this person with this reputation at stake, and these licenses at stake, finding out that all this time he really hadn't financed diamonds at all but it was cocaine. He would be furious. He would say, "I think there has been a

mistake made here. I never had any idea this was cocaine. I can't explain this. I don't understand this. But look at this. I have been double- crossed. I can't believe this."

That's what your common sense tells you an innocent person would have done. But what does he say on the stand? "No, I wasn't furious. No, I wasn't angry. No way. I was going to find out afterward if it was really true. I was going to find out if it was really cocaine." That's not the emotional reaction an innocent person would have.

COURT

This was harmless error due to overwhelming evidence of guilt and the defense counsel's failure to object.

Sometimes the court on appeal will find error and hold it harmless or find no error and go on to hold that even if the argument contained error, it was harmless. In *State v. Williams,* 120 Ariz. 600, 587 P.2d 1177 (1978), the prosecutor commented on suppressed evidence. Appellant argued that the statements taken together amounted to a comment on the exercise of his Fifth Amendment right to remain silent. After first noting that the defendant took the stand and admitted his participation in the crime, the court stated: "Even if these statements should be considered as falling within the spirit of *Griffin,* which we doubt, we consider the error was harmless."

State v. Rosas-Hernandez, 202 Ariz. 212, 42 P.3d 1177 (App. Div. 1 2002).

State v. Harrison, 195 Ariz. 28, 985 P.2d 513 (App. Div. 1 1998) (comment that jury could "take into consideration" Defendant's prior convictions was harmless).

State v. Bible, 175 Ariz. 549, 858 P.2d 1152 (1993) (comment that victim also deserved a fair trial was harmless).

State v. Taylor, 112 Ariz. 68, 537 P.2d 938 (1975).

State v. Anderson, 110 Ariz. 238, 517 P.2d 508 (1973).

State v. Scarborough, 110 Ariz. 1, 514 P.2d 997 (1973)(comment on defendant's silence after *Miranda* rights given was harmless here -- clear evidence of guilt).

State v. Chatman, 109 Ariz. 275, 508 P.2d 739 (1973).

State v. Taylor, 109 Ariz. 267, 508 P.2d 731 (1973).

State v. Branch, 108 Ariz. 351, 498 P.2d 218 (1972).

State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971)(comment on use of gun, if error, was harmless due to jury instructions).

State v. Makal, 104 Ariz. 479, 455 P.2d 450 (1969).

State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967).

State v. Rendel, 19 Ariz.App. 554, 509 P.2d 247 (App. Div. 1 1973).

State v. Hall, 18 Ariz.App. 593, 504 P.2d 534 (1972) (reference to prior uncharged sales was harmless error -- also, no objection).

State v. Crank, 13 Ariz.App. 587, 480 P.2d 8 (1971).

State v. Harris, 134 Ariz. 287, 655 P.2d 1339 (1982)(error was harmless because, after all, the police caught the defendant red-handed!).

E. Cumulative Effect of Improper Arguments

From time to time, a case is reversed because of the sheer number of improper arguments made. In *State v. Filipov*, 118 Ariz. 319, 576 P.2d 507 (1977), the prosecutor repeatedly expressed his personal belief in defendant's guilt, referred to his national origin, and argued facts not in evidence despite several sustained objections. The court held that "while any one of the improper statements taken alone might not warrant a mistrial, the cumulative effect of the argument was prejudicial and mandates a reversal. See also *State v. Hughes*, 193 Ariz. 72, 969 P.2d 1184 (1998); *State v. Woodward*, 21 Ariz.App. 133, 516 P.2d 589 (App. Div. 1 1973) (personal opinion, facts not in evidence, inferred that judge looked with favor on the case).

State v. Eisenlord, 137 Ariz. 385, 670 P.2d 1209 (App. Div. 1 1983).

> On other occasions, this court has held that the cumulative effect of improper statements made in closing argument mandates reversal. (citations omitted) In the instant case, we find that the cumulative effect of the prosecutor's remarks does not warrant reversal. The improper remarks were brief and not designed to inflame the jury. They were objected to by defense counsel, sustained by the court, and cured by instructions. This court's comments and rulings, however, are not to be interpreted as condoning such misconduct. In another setting, with other evidence in the record and different rulings by the court, such comments of counsel could cause reversal. We seriously doubt, however, that such remarks individually or collectively in the setting of this case improperly influenced the jury in reaching its verdict and we find no significant prejudice therefrom.

(Emphasis added)

F. Discretion of Trial Court

> The granting or denial of a mistrial based on improper argument is usually within the sound discretion of the trial court. [citation omitted] We will not usually review the exercise of the trial court's discretion in such cases unless there is "invective so palpably improper that it is clearly injurious."

State v. Adams, 1 Ariz.App. 153, 155, 400 P.2d 360, 362 (1965).

State v. Far West Water & Sewer, Inc., 224 Ariz. 173, 228 P.3d 909 (2010).
State v. Huffman, 222 Ariz. 416, 215 P.3d 390 (App. Div. 2 2009).
State v. Speer, 221 Ariz. 351, 207 P.3d 604 (2009).
State v. Dann, 220 Ariz. 351, 207 P.3d 604 (2009).
State v. Adams, 1 Ariz.App. 153, 400 P.2d 360 (1965).

VI. GENERAL

Most prosecutors agree that by the time closing argument rolls around the success of your case has already been determined i.e. you usually cannot clutch victory from the jaws of defeat in your closing.

Although it is true that a prosecutor is limited in closing by what he's done or has not done) throughout the trial, almost every prosecutor feels that many of his close cases were won (or more

often, especially when neophytes, lost) in final argument.

The following is but a series of suggestions on fundamental techniques which may help you to win a few of those "close ones."

A. Preparation

Closing argument is not a separate and distinct part of a trial. It can never be prepared for in a vacuum but only in the context of all of the evidence which has preceded it.

If you cannot draft 90% of your closing argument (opening and rebuttal) prior to trial you are simply unprepared.

B. Demeanor

1 .Confidence and Projection

People naturally tend to have confidence in people who have confidence. Jurors are no exception. Genuine confidence comes only with experience and preparation. What experience you lack you must make up for by overpreparation.

Further, never by word or action let the jury infer that you are inexperienced. Studies have shown that the prosecutor who tells jurors that this is his/her first case (in order to be honest with them or get their sympathy) is making a big mistake. Jurors tend to disregard the advice of a neophyte.

2 Certainty of Guilt

Absolutely crucial to your closing argument is the conveyance to the jury of your unequivocal certainty of the defendant's guilt.

a. Don't Say It; Show It.

The most graphic and dispositive illustration of the importance of this factor is that it is fundamental (reversible) error to express your opinion that the defendant is guilty.

It is however, perfectly proper to show the jurors by your every action that you know the defendant is guilty. You are limited only by your imagination in devising ways to convey this belief to the jury. For starters you might want to refer to many of the cases under PROPER ARGUMENT where the prosecutor's argument was distinguished from comments of personal belief. An example not discussed in that section is pointing your finger at the defendant and looking him straight in the eyes when you say something particularly indicting about him. (Also, if you point your finger at him it makes it clot easier for the jury to do it.) You are an advocate, not a judge. Be fair, but be firm in your advocacy.

b. Fairness

Most beginning prosecutors feel that they must be fair in their arguments or they will lose credibility with the jurors. In many aspects of the trial this is true - but not in the area of the defendant's guilt. Statements such as, "I know this is a tough decision for you" or "I don't envy your tough job" just make it easier for the jury to acquit. You must convey to the jurors that this is the "coldest" case you've ever tried (even if it's your first).

c. Lead the Jury to Convict

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Jurors, like most people, hate confrontations and will go out of their way to avoid them. In returning a verdict the path of least resistance is to return a verdict "not guilty." You must make their guilty verdict easy by every means possible. Your sincerity, your logic, your commitment and your conscience must provide the catalyst allowing the jurors to conquer their hesitation, fears and false doubts.

C Academic Arguments

It has been contended by some excellent trial attorneys that the best law students often have the hardest time adjusting to the art of presenting a case to the jury. This is especially the case with closing argument.

These experienced prosecutors hypothesize that this difficulty results from the student's inability to distinguish between arguing the law with a fellow student or lawyer and arguing to a jury.

Jurors are not impressed at all by the formalities of argument; they are impressed by arguments delivered concisely in a conversational manner. They want to and need to be "sold" on the reasons why they should convict. If they are not "sold" they'll acquit no matter how bad the defense is.

In developing your "style" try to forget the "formal" method of argument you learned, eschew the old preface to your sentences "I submit to you..." and learn how the great salesmen, preachers and lawyers sell their product i.e. learn the "art" of persuasion.

D. Know the Law of Closing Argument

1. Walking the Tightrope

Experienced prosecutors know that they must learn to walk a legal tightrope in closing argument. They must argue every prejudicial inference which can be drawn from the evidence but must not go so far as to invite a mistrial.

It is a sad commentary, but true, that almost no beginning prosecutors know "how far they can go" in closing without inviting a sustainable objection, mistrial motion, or reversible error. Possibly even worse, they have no idea of when to object to defense counsel's argument, "fight fire with fire" or let the comment slide by.

2. Objecting to Defense Argument

Although the legal section of this chapter discusses only prosecutorial error, much of the same law applies to the defense attorney - he must argue only those facts which are in evidence. For example, if the defense attorney starts telling the jury that his client has never even had a traffic ticket prior to being unjustly charged in this case you know that it's time to have the jury and the defense attorney admonished.

E. Creativity

In no other area of the law will you have the opportunity to exercise your creative energy as much as in closing argument. This is the really exciting aspect of trial work and you should exploit it to its fullest. The following are but a few concepts and examples to help ignite your creative flame.

1 Preparation

Defense attorneys, like prosecutors, have favorite stories or analogies they like to use in closing. If your opposing attorney has one or more, find out what it (they) are (by talking to other prosecutors who have had cases against them or reading transcripts of cases they have tried) and think up a foil. It may win the case for you. A couple of examples are:

a. The defense attorney always argued that the format of closing (prosecutor argues first and last) was like a sandwich - the real meat was in the middle. The prosecutor, in rebuttal, stated that the analogy was particularly apt in this case because the defense attorney's argument was all baloney.

b. In a homicide case where the decedent's body was never found, the defense attorney argued, "Ladies and Gentlemen, (the alleged victim) is not dead; in fact, at this very moment she is going to walk into the courtroom." After the jurors eyes had been glued to the courtroom door for several seconds, the defense attorney scoffed, "You see? You don't believe beyond a reasonable doubt she's dead either."

The prosecutor, in rebuttal, responded, "It's true, when defense counsel said (the victim) was coming through the door all of us looked, except the defendant."

2 Analogies, Metaphors and Similes

Consider the use of analogies, metaphors and similes in your closing argument, especially in rebuttal when there is no response possible. The use of these concepts should allow your jury to identify with your case or see the absurdity of the defense argument when taken to its logical conclusion. A couple of examples are:

a. A defense attorney argued vehemently that his client, who was apprehended seven hours after a burglary with the stolen property, could not be convicted of burglary or theft because there were no fingerprints or eyewitnesses who saw him in the house (implying the charge should have been possession of stolen property).

The prosecutor in rebuttal said that, "Defense counsel would have you believe that if the defendant had been caught just outside (the victim's) window with a bag over his back, like Santa Claus, carrying away (the victim's) property, he could not have been convicted of burglary and grand theft. If this were the law, it would be absurd and we would never be able to catch these criminals (pointing at the defendant). This, of course, is not the law. . ."

b. The defense attorney argued that the prosecutor's case rested primarily on the testimony of an accomplice and that this was totally inadequate and a waste of taxpayer money. The prosecutor responded with the "birds of a feather argument," then told the jurors that the witness was but a tool. (Looking directly at a carpenter on the jury) "When a carpenter builds your house, you don't go tell him to use a screwdriver to pound a nail, you let him do the job." (Looking directly at a teacher) ". .and you don't go to your local school and tell the teachers what tools must be used to train your kids etc."

3. Rhetorical Questions

There has never been a criminal jury trial where rhetorical questions could not form an integral part of the argument, especially rebuttal. Here are but a few:

"If the defendant was with these other people during the robbery, why didn't he bring them in to testify? . . . It's just a phony alibi . . ."

"Why would any woman put herself through this if she hadn't been raped?" (You should have previously explained all of the indignities she experienced.)

"If this had happened to you, do you think you'd ever forget the face of the man who did it? . . . It would be burned into your memory forever."

4. Visualization

One important factor that beginning prosecutors fail to realize is that every aspect of a criminal trial is staged to prevent a juror from "feeling" the crime. The juror is in the comfortable setting of the courtroom, precluded from visiting the crime scene and sits face-to-face with a defendant who doesn't look like a criminal.

You and only you can put the juror at the scene of the crime. You absolutely must get the jurors out of the courtroom and at the scene. Often times, you may want to preface your comments with an appeal to the jurors' common sense i.e. "You didn't have to leave your common sense in the corridor when you came into court to hear this case (hopefully, the judge will have already said this or you have a jury instruction on point). In fact, if you had been at the scene, you know that you would have no problem at all finding the defendant guilty.

VII. OPENING YOUR ARGUMENT

The state is permitted to argue first, then the defense attorney may argue, and finally the state is allowed to rebut any arguments made by the defense. Although the first argument made by the prosecutor is characterized in many ways, for purposes of this manual it will be characterized as "opening argument."

The purpose of the opening argument is to present an analytical logical review of evidence to the jury. At the same time the prosecutor must explain how the facts of the case constitute a crime.

A. Beginning Your Argument

1. Memorizing Your Argument

Most prosecutors develop a beginning which they can recite by memory. The following are the types of information you might want to convey to the jurors at the beginning of your argument.

2. Thank the Jurors

Jurors, like everybody else, appreciate being appreciated. Don't overdo it, but a sincere "thank you" to the jurors for their service, time, or patience can never hurt and may help a great deal.

Besides, you may rest assured that if you do not thank the jurors the defense attorney will. If, however, the defense attorney thanks them after you do, it will look as if he's just following your lead.

3. Explain What the Closing Argument Is

It is well that you establish your credibility early in your argument. This may be most easily accomplished by

explaining to the jurors what your closing arguments are and are not.

a. Tell them that what you say is not evidence (be sure to tell them what "evidence" is e.g. the testimony they have heard and the exhibits admitted). Explain to them that they are the final arbiters of what the facts are and that their collective recollection of the facts is better than that of yours or the defense attorney.

b. Tell them that you will be discussing the law but that if what you say is different from what the judge says, follow the judge's instructions. You might also add that you "will not intentionally misstate either the law or the evidence."

c. The above statements not only make a prosecutor appear more credible and fair but also have saved many a prosecutor on appeal when it is shown that the prosecutor (inadvertently) misstated the facts or misconstrued the law in closing.

4. Problems in Your Case

One issue you should always consider in the drafting of opening argument is how to discuss problems in your case which have been raised by the defense. Try to approach your problem areas positively -- The defendant is guilty (or you wouldn't be trying him); since he's guilty there has to be a logical explanation for any defense (which you should have brought out in examination).

The answer will depend upon many factors:

a. Is the problem one which is better saved for rebuttal discussion (when the defense attorney will not have an opportunity to respond)? Careful though -- if he doesn't raise it, the judge may not allow you to in rebuttal.

b. Will the jury think that you are fair?

c. Can you state the problem so as to "draw the sting" of the defense attorney's argument e.g. "the defense attorney will tell you . . . but . . .", "the defense attorney will claim . . . but . . ."?

If you decide to cover the problems in opening argument, try to dispose of them as you would your losers when playing a no-trump hand in bridge - as early as possible.

B. The Heart of Your Opening Argument

The heart of a prosecutor's opening argument is normally devoted to a discussion of the elements of the crime and assertions as to how the state has proved each and every one of them beyond a doubt.

This is effectively conveyed by the use of a visual aid i.e. a list of the elements in large print which you have previously drawn up.

As you discuss each element, and how you have proved it, work in the jury instructions and exhibits where applicable. It is best to have the exhibits and jury instructions right at your fingertips as it is very distracting to walk around looking for your exhibit as you explain your evidence. It is usually best to read key instructions to the jury as then the jurors will pay more attention to them when the judge discusses them.

C. Closing Your Opening Argument

The conclusion of your opening argument is an important part of your argument. At this point you should score points with the jury which will carry you through till rebuttal and at the same time shift the burden of persuasion to the defense.

Although there are many ways of putting the defense literally and legally on the defensive, probably the most consistently effective is by implicitly or explicitly challenging the defense attorney to answer certain questions raised by your evidence. Almost any case with enough evidence to get to the jury will have a number of these questions inherent in the case.

The form of your argument may be "The defense attorney will (or may) tell you ... if he does, ask yourselves this ..." or challenge defense counsel to "explain this (or these) facts...."

The longer defense counsel spends answering your questions the less effective he will be. If he neglects to answer your questions, the more likely it will be that you can raise that fact in rebuttal.

VIII. DEFENSE ARGUMENT

A. Reasonable Doubt and the Presumption of Innocence

The principal weapon in the defense attorney's argument arsenal is the state's burden to prove the defendant guilty beyond a reasonable doubt. The defense normally uses this burden and the defendant's presumption of innocence as a springboard for discussing several minor inconsistencies or holes in the state's case pointing out that each should create a reasonable doubt resulting in acquittal.

B. Theory of the Case

Most experienced defense attorneys weave their argument around a theory of the case which is consistent with the facts which the state can prove beyond any doubt but which disputes weaknesses in the state's case.

In other words, a good defense attorney will, by virtue of his opening, cross and direct examination set up a theory of the case which he can "hammer home" in closing.

Some defense attorneys often try to use as many theories as there are weaknesses in the state's case. This may be effective if the theories are inherently consistent. For example, the state's failure to prove either that theft was in an amount over $100 or that the defendant was the thief.

Many beginning defense attorneys will try to argue alternative or inconsistent defenses. For example, in an assault case, some attorneys will build their cross-examination around the weakness of identification and later switch to self-defense. Courts and lawyers often buy such nonsense. Jurors will not.

C. Red Herring and Smoke Screens

There has never been a case where a competent defense attorney couldn't argue a red herring and throw up smoke screen to confuse the jury.

State v. Rosthenhausler, 147 Ariz. 486, 711 P.2d 625 (App. Div. 1985).

The rebuttal argument of the prosecutor to a "red herring" argument by the defense attorney was permissible.

Although the argument may have been confusing on whether a simulated gun is sufficient in aggravated assault, we do not find prejudice. The simulated gun argument is a red herring. Nothing in the record suggests any of the guns used were anything but real., Further, the court's instructions limited the simulated gun to the crimes of armed robbery.

D. Anticipatory Questions For and Answers To Rebuttal

Many good defense attorneys throw up questions in their argument which are rhetorical, unanswerable or tangential to the issues in the case. They will also try to anticipate the points which will be made by the prosecutor and answer those points or make light of them. Finally, the attorney will attempt to get the jury in the frame of mind to answer the prosecutor's arguments for him.

IX. NOTE TAKING DURING DEFENSE ARGUMENT

If you have properly prepared your case, you will find that very little note taking will be necessary during defense argument. This is fortunate because trying to copy down alot of defense argument (and your response to it) will only confuse you (and later, the jury).

Try to set up your notes for rebuttal so that you can leave a space for a few responses to defense counsel's points.

Be sure to watch the jurors' response to defense counsel's arguments. If jurors respond positively or negatively to any of the argument or take notes, be sure to note and discuss the point(s) in your rebuttal. If the jurors think it's important - it's important.

X. REBUTTAL

Rebuttal argument is that point in the trial when a prosecutor is permitted to rebut points made by the defense in its closing. Rebuttal is the time to turn on your rhetorical and emotional heat.

A. Begin Your Rebuttal With a "Zinger"

The importance of a strong beginning cannot be overestimated. The defense attorney has just completed his argument, and if he was any good, he has scored some points with the jury. Those points are ringing in the jurors' ears and will continue to ring until you begin to score.

In your preparation for trial think of the most prejudicial yet proper argument and save it for the beginning of your rebuttal. A good place to begin for this is the section Proper Arguments, (If the defense felt the argument prejudiced its case and appealed on those grounds, you can rest assured it had an impact upon the jury.) For example, rarely if ever, does the defense present evidence to refute all points made by the state.

1 Absent Witnesses

A point which is often applicable, sufficiently prejudicial, and surprising to the jury is the issue of the

absent defense witness(es).

2. "Facts" Not Discussed by the Defense

Defense attorneys often will not discuss portions of the state's case which can only point to the guilt of the accused. Explain to the jury why the defense ignored these adverse facts. (If the defense ever objects to your rebuttal as beyond the scope of rebuttal you can always argue that this is the basis for your rebuttal.)

3. Speculation and Overstatement

Defense attorneys, like prosecutors, are permitted in closing to draw reasonable inferences from the evidence. You will find, however, (especially when the defendant does not take the stand) that the defense attorney will invite the jurors to speculate upon what happened. Often they will overstate "their" case so badly that it is impossible to justify it from the facts in evidence. In such circumstances (if you decided not to object or objected weakly), you may want to begin with, "Do you remember at the beginning of my opening argument explaining that what we say is not evidence? After hearing the defense's argument, you know why we have that rule." or "While I was sitting there listening to the defense argument I thought for a moment I was in the wrong courtroom." . . "When did you hear any witness say . . .?"

"What witness took the witness stand and said . . .?" "Defense counsel is attempting to fool you . . ." One thing about which you can be sure. Jurors will speculate about facts not filled in by the state or defense. This speculation almost always inures to the benefit of the defendant.

4. The Defense Opening Statement

Often the defense attorney, in his opening statement (at the beginning of the trial) will attempt to persuade the jurors by "testifying" that certain events occurred which there is no way for him to prove. The purpose of this tactic is to blunt the effect of the state's opening and jurors often forget during deliberation whether they heard about the event during testimony or from the defense. Although beginning a rebuttal with a discussion of the "unfulfilled promises" in the defense's opening statement is probably a mistake - as it will seem weak and disjointed when the jurors are waiting for a rebuttal of the defense's closing argument - it is perfect to use immediately after your "zinger" as it supports, corroborates and compounds your assertion that the defense is not being straightforward and candid with the jury.

B. Rebutting the Defense

1 Reasonable Doubt

Jurors don't care that much about reasonable doubt; all they care about is "Did he do it?". Unfortunately, all doubts are resolved against the state - therefore, when a juror approaches a prosecutor after trial and says, "We knew he did it, but there just wasn't enough evidence", the prosecution has been victimized by the "reasonable doubt" standard (ask any experienced prosecutor, and he'll tell you it's happened to him or someone he knows).

Possible ways to avoid the problem are to be frank and upfront with the jury. Tell them that:

a No one can define it precisely; that's why the judge won't even define it in his jury instructions. "It's up to you to decide."

b Defense counsel gave only a partial explanation of reasonable doubt.

Proof beyond a reasonable doubt is certainly not proof beyond any doubt or beyond a shadow of a doubt. "If it were, how would we ever convict any of these criminals?"

c They should follow their feelings and common sense. A doubt can be raised about anything and everything in the ordinary course of our lives. Again try to get them out of the courtroom and at the scene when you argue this. "Ladies and gentlemen, if you were at the scene and saw this happening, would you have a reasonable doubt?" or "If you were outside the courtroom and all these witnesses told you what happened, would you have to leave your common sense at the courtroom door? In fact as the judge has (or will) instruct you, it's an important thing to take with you to deliberations."

d Place the reasonable doubt and presumption of innocence standard in the perspective of the constitutional liberties assigned to every defendant in a criminal trial. Point out that these rights are just a couple of the many allowed all defendants - right to attorney, jury of peers, etc. (even jury instructions are merely and mainly incantations of a defendant's "rights".)

1) Jurors are aware of and resent constitutional technicalities which just allow the guilty to be free.

2) You would be surprised how many jurors do not think that all defendants have the constitutional right to be presumed innocent and proven guilty beyond a reasonable doubt. That a judge would grant these rights to this particular defendant must mean the court is on the defendant's side.

e Try to direct the jury's attention and focus to the main purpose of a trial and their duty - to determine the truth. Jurors identify much better with a truth than reasonable doubt standard.

2 The Defense Theory

Normally, the defense theory should be attacked frontally and not avoided. The best way to attack is with one, two, or a few rhetorical questions.

a. "Defense counsel said that his client did not commit this rape (robbery), etc. Ladies and gentlemen, if this happened to you would you ever forget? . . ."

b. "Defense counsel says that the state has failed to prove it's case; how much more evidence could you want?"

c. "Defense counsel claimed . . . how can that possibly be true in light of the fact that . . . a fact which defense counsel doesn't dispute."

d. "Defense counsel says the state's witnesses are not telling the truth. What possible motive do they have to lie? They have nothing better to do than make up a story against someone they don't even know so they can send him to prison? . . They have nothing better to do than frame an innocent man? What motive does the defendant have to lie?"

3 Red Herring and Smoke Screens

The most important thing to remember with respect to this portion of the defense case is to characterize it for what it is - smoke and no substance. An appropriate analogy is the octopus which when it is in trouble or about to be caught throws up a smoke screen and flees. What the defense is fleeing from are the real

questions in the case.

The second most important thing to remember is - don't chase every red herring the defense throws out. You'll go off on tangents and the jury will follow you - they'll not only consider the point more important than it is because of your attempts to counter, but also become confused as to what the real questions in the case are.

Pick one or two points and try to refute them in a manner showing the jury that the defense attorney was trying to fool them or get them to take their "eye off the ball." If you can show this, they won't believe anything else he had to say anyway.

4 Credibility

The major question in many cases is who is telling the truth (or is mistaken). In these cases every juror will believe that if witnesses for the state say one thing and witnesses for the defense say another there is automatically a reasonable doubt.

It is absolutely imperative, therefore, that you hammer home the jury instruction that the jurors must determine who is telling the truth before resolving other issues; that it is their duty and responsibility to decide who is right.

Concomitantly, of course, you must give them facts which reflect that your witnesses are truthful or right and not the defendant's.

C. Analogies and Themes

In the preparation of your case try to formulate some analogy or theme which you can weave throughout the direct and closing.

D. Discussion of Jury Deliberations

Most jurors will have never sat on a jury trial. Consequently, they will have no idea of what they are supposed to do during deliberations.

A creative state's attorney can subtly direct and control
jury deliberations by anticipating deliberation problems.

1 Narrowing the Issues

By the end of argument jurors should have a clear idea of the issue(s) upon which the guilt of the defendant must turn. This may be easily accomplished by telling the jurors, "Ladies and gentlemen, there is only one (two or three)
issue(s) in this case." Steer them to the meat and away from tangential.

E. How to End Your Rebuttal

Many beginning prosecutors begin their ending by apologetically telling the jurors that there are only a few more points they have to make. This is a mistake.

End your rebuttal strongly. Be sure at the end the jurors know the exact issue(s) to be resolved and why it (they) can only be resolved one way. In many (maybe most) cases your strongest proper and prejudicial argument is an emotional appeal relating to the crime in the streets which everybody complains about, and the jurors have an opportunity to do something about.

Always conclude with a firm "demand-request" for a guilty verdict. An example might be, "Finally, I ask you to do three things:

1. After the judge reads you the instructions, I ask you to go back to the jury deliberation room and pick a foreman.

2. I ask you to take a vote.

3. I ask you to vote guilty unanimously and come back here, and give this defendant the same speedy justice he gave the victim (or come back here and tell this defendant this community will no longer tolerate this lawlessness).